(9)

No. 109, Original

In the Supreme Court of the United States

October Term, 1990

States of Oklahoma and Texas,

Plaintiffs,

v.

State of New Mexico,

Defendant.

Jerome C. Muys, *Special Master*

REPORT

October 15, 1990

In Memoriam

During the course of these proceedings the western water community lost two of its giants, Charles J. ("Charlie") Meyers and Stephen E. ("Steve") Reynolds. At the time of his death in 1988, Charlie Meyers was serving as Special Master in *Texas v. New Mexico*, No. 65 Original, a dispute over the Pecos River Compact. He had enjoyed a long and distinguished career as a law professor at Texas, Columbia and Stanford, from which he retired as dean in 1981, and later in private practice, where he continued to distinguish himself in the natural resources field. The undersigned first met Charlie when he was serving as law clerk to Special Master Simon H. Rifkind in *Arizona v. California*, No. 8 Original, in the late 1950's and we remained friends since that time.

Steve Reynolds' death this year capped a 35-year career as New Mexico's State Engineer, where he played a powerful and respected role in western water policy. He was active in the present proceedings and displayed his well known flair and wit right up until his final illness.

The West of Sam Foss' poetry sought "men to match my mountains." Charlie and Steve were such men, and I doubt that we shall see their likes again.

Jerome C. Muys

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I. SUMMARY OF THE CONTROVERSY

The Canadian River is an interstate river system which rises along the boundary between southeastern Colorado and northeastern New Mexico. From its headwaters the Canadian River flows south, then generally from west to east through New Mexico and the Texas Panhandle into Oklahoma, where it flows into the Arkansas River, a tributary of the Mississippi. The North Canadian River, a major tributary of the Canadian River, rises in northeastern New Mexico and flows eastward through the Texas Panhandle into Oklahoma, where it joins the Canadian River before it flows into the Arkansas River. (App. No. 1).

In 1949 the proposed Congressional authorization of the Canadian River reclamation project in Texas triggered demands by New Mexico for a compact to allocate the waters of the Canadian River System among New Mexico, Texas and Oklahoma. The three States entered into the Canadian River Compact in 1950, which was ratified by them in 1951 and consented to by Congress in 1952. (App. No. 2).

The Compact made certain allocations of the use of the Canadian River System among the three States and established limitations on "conservation storage" by New Mexico and Texas. Ute Dam was constructed by New Mexico on the mainstream of the Canadian River in 1963 and enlarged in 1984. As a result of the 1984 enlargement Texas and Oklahoma claimed that New Mexico was violating the conservation storage limitation imposed on that State by the Compact. Limited discussions among the States proved fruitless and Texas and Oklahoma initiated this action in April 1987.

II. PROCEDURAL HISTORY IN THIS COURT

Texas and Oklahoma filed a Motion for Leave to File Complaint, Complaint, and Brief in Support on April 16, 1987. New Mexico filed its Brief in Opposition on June 25, 1987. The Court granted the motion on October 5, 1987 and New Mexico filed its answer to the complaint on December 4, 1987. The Court appointed the undersigned as Special Master on January 19, 1988.

The Special Master and the State representatives met in Phoenix, Arizona on February 26, 1988 for an organizational conference. On March 2, 1988 the Special Master issued Pre-trial Order No. 1 which provided for the filing of (1) a joint statement of material facts as to which there was no dispute, (2) separate or joint statements of material facts which appeared to be in dispute, and (3) separate or joint statements of the legal issues. The order directed informal exchange of documents and prohibited initiation of formal discovery without permission of the Special Master.

By letter dated April 8, 1988 the Land and Natural Resources Division of the United States Department of Justice responded to the Special Master's letter of March 2, 1988 and informed him that the United States would not seek to intervene in the case.

The required documents were filed on July 1, 1988. Another conference was then held in Denver, Colorado on August 23, 1988 for the purpose of determining the status of the States' efforts to arrive at a joint statement of agreed material facts and list of stipulated documents, the possible need for an evi-

dentiary hearing, and the filing of amended pleadings.[1]

On October 25, 1988 the States filed a preliminary Joint Statement of Facts, Joint Statement of Agreed Facts, Joint Statement of Disputed/Under Discussion Facts, and Joint Statement of Legal Issues. The Special Master met with the States in Santa Fe, New Mexico on November 3, 1988 for the purpose of coordinating the submittal of final statements of agreed facts, further narrowing areas of factual dispute and agreeing on a schedule for filing cross-motions for summary judgment on the legal issues. All parties agreed that the proceedings initially be confined to resolution of the question of whether New Mexico has violated the Compact and that consideration of issues pertaining to any appropriate relief for any violation that might be found be deferred until after that determination.

On December 1, 1988 the Special Master issued Pre-trial Order No. 2, which provided for the States to file (1) simultaneous motions for summary judgment on the legal issues raised by the pleadings and (2) a joint statement of facts, annotated to lists of exhibits considered to be material and relevant to the

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[1] On August 29, 1988, after discussions among the parties at the Phoenix and Denver conferences, the plaintiffs filed with the Special Master a Motion for Leave to File a Supplemental Complaint and Supplemental Complaint, which the Special Master filed with the Court on November 18, 1988. New Mexico did not oppose the motion, but requested that it be permitted to file a supplemental answer if the motion was granted. The Court, by order dated December 12, 1988, granted the plaintiffs' motion. New Mexico filed a Motion for Leave to File a Supplemental Answer and Supplemental Answer, which the Court granted by order dated February 21, 1989.

legal issues and as to which there is no genuine dispute. Provision was made for subsequent evidentiary objections and requests for discovery.

After those filings were made the States met with the Special Master in Denver, Colorado on April 11, 1989 to resolve any evidentiary issues, discuss discovery requests and schedule further proceedings. Discovery was completed on May 26, 1989. Responses to the cross motions for summary judgment were filed on June 19, 1989. Specifications of material facts as to which the States believed a genuine dispute existed and remaining evidentiary objections were filed on July 10, 1989. No further proceedings were held for the next several months because of conflicting proceedings in *Texas v. New Mexico*, No. 65 Original, the Pecos River Compact litigation, in which counsel for Texas and New Mexico in this case were also involved.

On September 13, 1989 the States met with the Special Master in Oklahoma City, Oklahoma to consider outstanding evidentiary objections and methods by which disputes over material facts could be resolved. At that meeting it was agreed that the disputed issues could be resolved without the necessity for trial. It was also agreed that reply briefs would be filed, with particular emphasis on matters on which the Special Master requested additional briefing.

Reply briefs were filed by the States on October 27, 1989. Six hours of oral argument were held on November 1, 1989 in Dallas, Texas. The Special Master circulated a Draft Report on March 23, 1990. Written comments on the Draft Report were submitted by the States on May 29, 1990 and the parties

filed replies on June 15, 1990. Seven hours of oral argument were heard on June 19, 1990 in Denver.

The record developed pursuant to the foregoing procedures consists of an agreed statement of 100 material facts as to which there is no dispute ("Agreed Material Facts"), 365 exhibits, 135 pages of pleadings, 422 pages of briefs, 498 pages of transcript of meetings, 566 pages of depositions and 433 pages of transcript of oral argument.

III. BACKGROUND OF THE DISPUTE

A. Pre-Compact Development on the Canadian River System

(1) New Mexico

The earliest uses of the Canadian River in New Mexico were along the Vermejo River and other upstream tributaries to the mainstream of the Canadian River in the vicinity of Raton. (N.M. Ex. 45C, pp. 5-6). In 1936 Congress authorized the construction of Conchas Dam on the mainstream of the Canadian River about 30 miles northwest of Tucumcari, New Mexico and the dam was completed by the Corps of Engineers in 1939. (N.M. Ex. 61, p. 4). In 1938, Congress authorized construction of the Tucumcari Project under the federal reclamation laws. (Act of April 9, 1938, 52 Stat. 211). Project construction was initiated in 1940 and completed in 1950. (N.M. Ex. 61, p. 5a; Agreed Material Fact B.4). The project was designed to irrigate some 42,500 acres of land and to satisfy the municipal and industrial needs of the City of Tucumcari. The project lands are located about 30 miles southeast of Conchas Dam and are served by the Conchas Canal which diverts water from Conchas Reservoir. (N.M. Ex. 61, p. 3 and maps, App. No. 1). There were approximately 10,000 acres of potentially irrigable lands scattered along the lower reaches of various tributaries to the mainstream of the Canadian River below Conchas Dam in New Mexico in 1950. (P. Ex. 109, p. 1).

Little, if any, uses had been made of the waters of the North Canadian River. (P. Ex. 36, p. 1).

(2) Texas

In 1949, the Panhandle area of Texas which is traversed by the Canadian River sustained some 1,250,000

acres of irrigated agriculture based on wells which tapped the vast Ogallala groundwater aquifer. The municipal and industrial requirements of the 280,000 residents of eleven cities in the region were also served by groundwater. There were no diversions of surface flows of the Canadian River for any purposes, primarily because of its erratic and wasting nature. (P. Ex. 99, pp. 5-7).

No significant uses had been made of the waters of the North Canadian River.

(3) Oklahoma

Oklahoma had made extensive use of the North Canadian River, but had made no use of the Canadian, although it had plans to do so. (P. Ex. 109, pp. 1-2).

B. Congressional Authorization of the Canadian River (Sanford) Reclamation Project, Texas

Studies of the water development potential of the Canadian River below Conchas Dam were initiated by the Bureau of Reclamation ("Bureau") in 1947 and resulted in a June 1949 report on a plan for development for the Canadian River Basin in Texas. It proposed the construction of a multiple-purpose project near Sanford, Texas,[2] whose principal purpose would be to serve the municipal and industrial requirements of eleven cities in the region. (N.M. Ex. 57, pp. 1, 14). Legislation to authorize the project, H.R. 3482, was introduced by Representative Eugene

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[2] Because of its proximity to Sanford, Texas, the Canadian River Project came to be known as the Sanford Project, which is how it is referred to in this Report. More recently it is sometimes referred to as the Lake Meredith Project.

Worley of Texas early in 1949 in the 81st Congress, along with H.R. 2733 authorizing the States to enter into a compact to apportion the waters of the Canadian River.

The Bureau's June 1949 report recommended that a compact allocating the waters of the Canadian River Basin among New Mexico, Texas and Oklahoma be entered into prior to initiation of project construction. Moreover, the New Mexico Congressional delegation opposed authorization of the Sanford Project until such a compact was in place. After H.R. 2733 passed the House in August 1949, it was held up by the New Mexico senators until a compromise amendment was adopted prohibiting the appropriation of funds for construction of the project until a compact had been ratified by the States and consented to by Congress. (P. Ex. 34). In the meantime, H.R. 3482 was enacted as Pub. L. 81-491 on April 29, 1950 (64 Stat. 93, 43 U.S.C. §600c note) and the Canadian River Compact was negotiated and signed by the State compact commissioners on December 6, 1950. On December 29, 1950, the Sanford Project authorization bill was enacted (64 Stat. 1124, 43 U.S.C. §§600b and c), section 2(b) of which provided (43 U.S.C. §600c(b)):

> Actual construction of the project herein authorized shall not be commenced, and no construction contract awarded therefor, until (1) the Congress shall have consented to the interstate compact between the States of New Mexico, Oklahoma, and Texas agreed upon by the Canadian River Compact Commission at Santa Fe, New Mexico, December 6, 1950 in conformity with Public Law 491, Eighty-first Congress. . . .

The required Congressional consent was granted May 17, 1952. (66 Stat. 74). Construction of Sanford Dam was completed in 1964, creating Lake Meredith Reservoir with a total capacity of 1,408,000 acre-feet. (P. Ex. 105, p. 1). The Sanford Project is operated by the Canadian River Municipal Water Authority ("CRMWA"), a Texas agency. The maximum amount of water ever impounded in Lake Meredith was 546,100 acre-feet in 1973. On August 19, 1988 the reservoir contained 360,700 acre-feet of water. (P. Ex. 93). The CRMWA is authorized to divert 100,000 acre-feet per annum for municipal purposes and 51,200 acre-feet for industrial purposes. (Agreed Material Fact C.24). Maximum annual diversions for those purposes were 80,652 acre-feet in 1980, of which 72,304 acre-feet were used for municipal purposes and 4,996 acre-feet were used for industrial purposes, while transmission losses accounted for 3,352 acre-feet. (P. Ex. 139). The population of the eleven cities served by the project is approximately 460,000. (P. Ex. 138).

C. The Negotiation of the Canadian River Compact, Ratification by the States, and Congressional Consent

In anticipation of the passage of the legislation granting consent to enter into a compact and authorizing the Sanford Project, and in response to the Bureau's June 1949 report, the three States appointed representatives in the Fall of 1949 to negotiate a Canadian River compact.[3] These representatives first

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[3] Agreed Material Fact D.4. In 1926 an entirely different group of state representatives from New Mexico, Texas, Oklahoma and Arkansas negotiated a compact regarding control of the flood

met informally in February 1950. (P. Ex. 149). As required by the consent legislation passed a few months later, Mr. Berkeley Johnson, District Engineer for the United States Geological Survey in Santa Fe, New Mexico, was appointed federal representative to the Canadian River Compact Commission ("CRCC") by President Truman on May 26, 1950. (P. Ex. 11). Mr. Johnson, who had served the same function on the Pecos River Compact Commission two years earlier, appointed Mr. Raymond Hill, a prominent Los Angeles, California consulting engineer, as his engineering advisor.

The first official meeting of the CRCC was in Santa Fe, New Mexico on June 30, 1950. (P. Ex. 96A). At that meeting each State made a short statement as to what it hoped to obtain from a compact. Raymond Hill was named Chairman of an Engineering Advisory Committee composed of the engineering advisors to each Commissioner ("Engineer Advisors"). The Engineer Advisors were instructed to review matters which had been suggested for study by Texas Commissioner Spence in a memorandum submitted to the Oklahoma and New Mexico commissioners after the informal meeting in February, to make suggestions

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waters of the Canadian River. The 1926 compact was signed and ratified by each state except Arkansas, which abstained, but the Texas legislature's ratification was vetoed by the Texas governor, rendering the agreement ineffective. Witmer, *Documents on the Use and Control of the Waters of Interstate and International Streams*, H. Doc. No. 319, 90th Cong., 2d Sess. 45 (1968). Because the 1926 compact is so far removed from the 1950 compact at issue here in time and focus, it is of no relevance to resolution of the issues presented by this case.

for additional data or studies that would be necessary or useful in developing a compact, and to initiate such studies. The Engineer Advisors met immediately following the June 30, 1950 CRCC meeting to consider existing hydrological and other technical data and whether there was any need to compile additional data. (*Id.* at 6).

The second official meeting of the CRCC was held in Ardmore, Oklahoma on October 11-12, 1950. (P. Ex. 96B). Raymond Hill presented a formula based on future storage limitations in each State which the Engineer Advisors believed would be an appropriate basis for a compact. He stressed that the principles suggested were quite simple and their effect on river operations could easily be tested. The recommended formulas were approved in principle by each Commissioner, and the Engineer Advisors were directed to report to the CRCC by December 15, 1950 on the effect of the formulas on the availability of water to each State. The Commission directed a Legal Committee ("Legal Advisors") to draft a compact implementing the Engineer Advisors' proposal and to submit it to the Commission by December 15, 1950 for consideration at the next official meeting of the Commission which was set for December 18, 1950. (*Id.* at 3). The Engineer Advisors prepared a draft compact dated October 11, 1950 which Raymond Hill forwarded to the Legal Advisors with a covering memorandum dated October 13, 1950. A partial draft compact dated November 14, 1950 was prepared by the Texas Legal Advisor in coordination with the other Legal Advisors and Raymond Hill and forwarded to the Engineer Advisors with the explanation that the Legal Advisors had not been able "to sat-

isfactorily word those articles of the Compact dealing with restrictions upon storage." (N.M. Ex. 30, p. 1).

The third meeting of the CRCC was advanced from December 15 to December 4-6, and Texas Commissioner Spence expressed his desire to have a compact signed by December 6 so that the Sanford Project authorization bill could go forward. (P. Exs. 18 and 21). The CRCC met in Santa Fe, New Mexico on December 4, at which time the Engineer Advisors made revisions to the earlier storage limitation formulas. Raymond Hill was directed to work with the Legal Advisors to revise the draft compact in accordance with the Engineer Advisors' revised formulas. That group prepared a draft compact on December 5, which was revised and presented to the Commission on December 6 at 11:15 A.M. and, after some revision, signed by them at 1 P.M. (P. Ex. 96C). Chairman Johnson later reported that "[t]he compact reached the signing stage at the third meeting which certainly constituted a record." (P. Ex. 110, p. 1).

By letter dated January 17, 1951, Chairman Johnson requested Raymond Hill to prepare a "written statement of your explanation of the various articles of the compact . . . ". (P. Ex. 140). Hill prepared such a memorandum entitled "Development of Final Wording of Compact" and dated January 29, 1951 (N.M. Ex. 30, p. 1) ("Hill Memorandum"), which was approved by the CRCC at its fourth and final meeting on January 31, 1951 as being consistent with what transpired at all meetings and in the discussions of the CRCC. The CRCC also found that the final draft of the Compact carried out such interpretation and expressed the view of the CRCC. (P. Ex. 96D).

In addition to the Hill Memorandum, the only records of the Compact negotiations produced by the States consist of rather cryptic minutes of the four official meetings, certain hydrologic data utilized by the Engineer Advisors, three reports by the Texas Engineer Advisor to his superiors on the work of the Engineering Advisory Committee, and a few scattered pieces of correspondence among the engineers, lawyers and commissioners.

The Compact was ratified by New Mexico on February 7, 1951 (*see* N.M. St.Ann. §75-34-3 (1985 Repl. Vol.)), Oklahoma on March 22, 1951 (*see* 82 Okl. St.Ann. §526.1 (1970 ed.)), and Texas on May 10, 1951 (*see* V.T.C.A. Water Code §43.001-006 (1988)). Congress consented to the Compact by the Act of May 17, 1952. (66 Stat. 74).

D. Operations of the Canadian River Commission

Article IX of the Compact created an "interstate administrative agency" designated the Canadian River Commission ("Commission"). Its membership is composed of three commissioners, one from each State, and an additional commissioner representing the United States, who is the non-voting presiding officer of the Commission. All members of the Commission must be present to constitute a quorum and a unanimous vote of all three State commissioners is required for "all actions taken by the Commission". (Art. IX(a)).

The Commission is authorized to employ necessary personnel "for the performance of its functions under this Compact" and to enter into contracts with federal agencies for the collection and presentation of relevant data and reports. (Art. IX(c)(1) and (2)). It

also has a broad grant of authority to "[p]erform all functions required of it by this Compact and do all things necessary, proper, or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies." (Art. IX(c)(3)).

The Commission is mandated to maintain necessary water measurement facilities, to make an annual report to the governor of each State, and to make information available to the governors of the three States and appropriate federal representatives.

The organizational meeting of the Commission was held in Clayton, New Mexico on April 23, 1954. (P. Ex. 97A). From 1955 to 1962 the Commission conducted annual meetings which became increasingly shorter in duration. Except for 1965, when a regular meeting was held, the Commission's annual meetings from 1963 to 1970 consisted of telephone conference calls, some of which were only ten minutes in length. (P. Exs. 97K-97R). Beginning in 1971 the Commission resumed convening for its annual meeting. (P. Ex. 97S). No formal committees were established until 1971, when a Budget Committee was appointed (*id.*), but a budget was not established for Commission operations until 1978, and it has ranged from $900 to $1500 annually since that time. (P. Exs. 97W, 97BB).

The content of the annual meeting has generally been a presentation by each State of Canadian River water resource development matters of possible interest to the other States. The water storage information required by Article VIII of the Compact has usually been presented by the Engineering Committee, which was officially formed and given this charge in 1974. (P. Ex. 97T, p. 5). Its first inventory of

reservoir storage capacity in each State was submitted to the Commission in 1977 and has been updated annually. (P. Exs. 95O-U).

E. Genesis of the Controversy

The Compact limitations on New Mexico's use of the Canadian River and North Canadian River are set out in Article IV, as follows:

> (a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.
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> (b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.
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> (c) The right of New Mexico to provide conservation storage in the drainage basin of North Canadian River shall be limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and of Oklahoma.

After some site investigations in the mid 1950's, the New Mexico Interstate Stream Commission ("NMISC") selected a site one mile west of Logan, New Mexico on the mainstream of the Canadian River about 45 miles below Conchas Dam for the construc-

tion of Ute Dam and Reservoir.[4] (P. Ex. 50). Beginning in 1957, the New Mexico legislature authorized the NMISC to issue special revenue bonds to finance construction of the project. (P. Ex. 47). In February 1957 the NMISC filed a Notice of Intention to appropriate and store 200,000 acre-feet of water below Conchas Dam. It subsequently filed an application for a permit to appropriate and store water for the project in February 1960, which was approved in 1962. (P. Ex. 50).

Construction of Ute Dam was completed in April 1963. The initial reservoir capacity was 109,600 acre-feet and the structure was built to accommodate an enlargement of the reservoir to a total capacity of 272,000 acre-feet by the installation of spillway gates. (P. Ex. 97L, p. 2). The New Mexico legislature subsequently authorized the enlargement of the dam in 1978. When adequate funding was finally authorized, construction began in 1982 and the enlargement was completed in 1984. Its enlarged capacity is 272,800 feet, and its water surface area at spillway crest has been more than doubled from 3,821 acres to 7,947 acres. (P. Ex. 78; Agreed Material Facts E.8, E.11). As of 1984 Ute Reservoir's capacity to store water was 246,617 acre-feet, the remaining capacity being occupied by sediment. (Agreed Material Fact E.10). Sediment deposition in the reservoir averaged 1,246 acre-feet per year for the period 1963-1983 inclusive,

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[4] Twenty-fifth Biennial Report of the State Engineer of New Mexico for the 49th & 50th Fiscal Years (July 1, 1960 to June 30, 1962). The Interstate Stream Commission is charged with protecting New Mexico's interest in interstate streams and protecting, developing and conserving all waters of the State. *See* N.M. St.Ann. §§72-14-1 through 72-14-3, 75-2-4 (1978).

the period for which actual data are available, and annual sediment deposition is expected to continue at that level. (Agreed Material Fact E.21). Consequently, *if* that average annual rate of sediment deposition has continued, the estimated sediment in the reservoir has increased by about 8,700 acre-feet since 1984, making the estimated actual maximum water storage in the reservoir on May 16, 1987, when it spilled, about 241,700 acre-feet and the current storage capacity about 237,900 acre-feet.[5] No storage space is currently allocated to or used for either flood control or power production.

When New Mexico decided to build Ute Dam in 1957 and so informed the Commission at its annual meeting in 1958 (P. Ex. 97F, p. 2), the announcement engendered no apparent concern on the part of Texas and Oklahoma, presumably because the projected initial capacity of the project was only 109,600 acre-feet, well within Article IV(b)'s 200,000 acre-foot limitation on conservation storage. (P. Ex. 97L, p. 2). The fact that Ute Dam was constructed so that spillway gates could be installed to increase its capacity to 272,000 acre-feet was apparently first communi-

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[5] Maximum actual water storage on May 16, 1987 *probably* did not equal the maximum 1984 capacity of 246,617, as Agreed Material Fact F.14 states, but an amount closer to 241,633 acre-feet (246,617 minus 4,984) to allow for four additional years of sediment deposition. It is emphasized that the States are only in agreement as to *actual* sediment deposition through 1983, the date of the last United States Geological Survey study. Any estimates of subsequent sediment deposition referenced in this Report are solely those of the Special Master to illustrate the *probable* present situation and will necessarily be subject to verification or modification by agreement of the parties or actual survey in any subsequent phases of this proceeding.

cated to the Commission by the New Mexico Commissioner at the annual meeting in 1964, but the Commission had previously been advised that, although New Mexico was investigating constructing up to 350,000 acre feet of capacity below Conchas Dam, it would be subject to the 200,000 acre-foot conservation storage limitation. (P. Ex. 97H, p. 2).

Similarly, perhaps because total reservoir capacity in New Mexico below Conchas Dam at the time was also well below the 200,000 acre-foot limitation, the Memorandum of Agreement between NMISC and the New Mexico Department of Fish and Game in 1962 obligating the NMISC to maintain a 50,000 acre-foot minimum recreation pool did not appear to generate concern in the downstream States,[6] although the issues of whether water stored or capacity allocated solely for recreational use or water stored in unused sediment control capacity constituted "conservation storage" under the Compact had surfaced as early as 1953 and 1955, respectively, but had not been resolved. (P. Exs. 42-44, 97I). The recreation issue was raised obliquely again in 1977 in connection with a Commission-directed inventory of all reservoirs with a capacity in excess of 100 acre-feet. At that time it was decided not to include reservoirs storing water solely for recreational purposes in the inventory, but, again, the issue of whether such storage was chargeable as conservation storage was not directly addressed and resolved. (*See infra* pp. 104-05).

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[6] P. Ex. 52. The existence of this agreement was first communicated to the Commission by the New Mexico Commissioner during the telephone conference call meeting of March 2, 1964. P. Ex. 97L, p. 2.

It was not until 1982, when the New Mexico legislature authorized funding of modifications to Ute Dam to increase the capacity of Ute Reservoir to 272,000 acre-feet and the NMISC contracted with the Bureau of Reclamation to design and oversee the additional construction, that Texas and Oklahoma formally expressed their concern that the planned enlargement might violate the Article IV(b) limitation.

At its regular meeting on March 31, 1982, New Mexico Commissioner Reynolds told the Commission that legislation had recently been passed authorizing additional funding for construction at Ute Dam and Reservoir over and above the amount authorized in 1978. New Mexico reported further that a contract had been entered into with the Bureau of Reclamation for the preparation of specifications, which would probably be completed in June, 1982, and the supervision of construction. (P. Ex. 97Z).

By letter dated July 28, 1982, Oklahoma informed New Mexico that, based on what it understood at that time, the proposed enlargement of Ute Dam and Reservoir would result in a violation of the Compact and suggested the initiation of discussions of the Oklahoma concerns (P. Ex. 71, pp. 2-3):

> It is for this reason that we wish to bring this matter to your attention and initiate discussions on the issue prior to New Mexico's actual commencement of construction and expenditure of substantial funds. Just as it is in the best interest of all to insure adherence to the provisions of the Compact, it is equally in the best interest of all, particularly New Mexico, that great amounts of time, energy

> and expense not be incurred for nought. We believe that you might concur that prudence dictates that we proceed as expeditiously as possible to entertain and resolve, if at all possible, this matter and that to the fullest extent possible, the risk of your state's not receiving the expected returns from its investment be minimized.

New Mexico responded that Ute Dam and Reservoir, as enlarged, would not, in New Mexico's opinion, violate the Compact and that New Mexico would be proceeding accordingly. (P. Ex. 73).

A special meeting of the Commission was held on September 29, 1982 at which there was a lengthy discussion of the proposed enlargement and the Oklahoma and Texas concerns that it would result in violation of the Compact. (P. Ex. 98E). At that point, bids for the construction work had been submitted but not yet accepted. (*Id.* at 97). Near the conclusion of the meeting, when it was apparent that no immediate resolution was possible, New Mexico was asked if it would at least agree to delay, for a reasonable period of time, further action until the Commission could attempt to resolve the issues presented by the proposed enlargement. New Mexico stated that it felt it must proceed despite the outstanding problems. (*Id.* at 96-98).

On October 18, 1982, Texas Commissioner Lemon informed New Mexico Commissioner Reynolds that, although Texas did not desire to stop or slow down the enlargement of Ute Dam and Reservoir, Texas was concerned that New Mexico's reservoir storage capacity below Conchas Dam exceeded 200,000 acre-feet. He stated further that (P. Ex. 74):

> Texas is gravely concerned with any theory that the compact does not restrict New Mexico in the reservoir capacity that your state could build. This, I should think, would be obvious because under such a theory New Mexico could construct a million acre-foot reservoir at the Texas-New Mexico state line so long as New Mexico would denominate 200,000 acre-feet of capacity as dedicated to conservation storage. In my judgment, such a proposition destroys the fundamental basis of the compact.

Commissioner Reynolds replied that New Mexico would adopt operating criteria to limit the amount of water in conservation storage to stay within the Compact limitation. (P. Ex. 75).

At its next regular annual meeting on April 14, 1983 the Commission, in further attempts to address and resolve the Ute enlargement issues, directed its Legal Committee to research certain questions and report back to the Commission. (P. Ex. 98F, pp. 56-62). Oklahoma and Texas submitted their positions at the Commission meeting of March 6, 1984, but New Mexico did not submit a report. (P. Ex. 98G, pp. 37-41).

On May 14, 1984 the NMISC adopted operating criteria for Ute Reservoir, which established a sediment control pool at elevation 3741.6 feet, which is the top of the recreation pool established in 1962 (*supra* p. 18) and set the conservation storage capacity of Ute Reservoir at 197,700 acre-feet. (P. Ex. 81). At the 1985 regular meeting, Texas Commissioner Sims stated his view that (1) any beneficial use

of storage should be chargeable as conservation storage unless the Commission specifically exempted such use and (2) the enlargement of Ute Dam and Reservoir, New Mexico's subsequent operating criteria notwithstanding, violated the Compact. (P. Ex. 98H, pp. 24-25). Oklahoma concurred with Texas' position, and New Mexico indicated that its present position was the same as expressed in 1984. (*Id.* at 26-27).

At the regular Commission meeting of March 12, 1986, the Texas Commissioner made the following motion (P. Ex. 98I, p. 51):

> That the Canadian River Commission, after having studied the Ute Dam enlargement and other potential for storage of water in excess of quantities allowed under Article IV of the Canadian River Compact, finds that the allocation of storage capacity for any use not specifically exempt from the Compact constitutes conservation storage under the Compact unless expressly determined otherwise by the Commission.

The motion was seconded by the Oklahoma Commissioner, but New Mexico voted "no", thus precluding the unanimity for Commission action required by the Compact.

The instant litigation was filed April 16, 1987.

The New Mexico claim that water stored in Ute Reservoir which had originated above Conchas Dam is not chargeable against the 200,000 acre-foot limitation in Article IV(b) was not laid before the Commission until almost a year after this litigation was initiated.

IV. ISSUES PRESENTED AND SUMMARY OF RECOMMENDATIONS

Texas and Oklahoma claim that, as of the completion of the enlargement of Ute Dam and Reservoir in 1984, New Mexico has been in knowing and willful violation of Article IV(b) of the Compact, which provides that "the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet." (Complaint at ¶12, Supp. Complaint at ¶1). As set forth in the complaint and refined throughout these proceedings, the claimed violation is based on plaintiffs' contentions that (1) Article IV(b) imposes a limit of 200,000 acre-feet on the constructed reservoir capacity physically available for conservation storage, not the volume of stored water, (2) if the Article IV(b) limitation applies to stored water, waters originating above Conchas Dam which either (a) spill over Conchas Dam or (b) constitute seepage or return flow from the Tucumcari Project and which reach the mainstream of the Canadian River below Conchas Dam and are captured by Ute Reservoir are "waters which originate . . . below Conchas Dam" within the meaning of Article IV(b) and are chargeable against its limitation on actual stored water, (3) whether the Article IV(b) limitation applies to physical reservoir capacity or actual stored water, the capacity allocated to or water actually stored in the "desilting pool" portion of the Ute Reservoir "sediment control pool" established by New Mexico's 1984 Operating Criteria is not "solely" for sediment control and is therefore not exempted from the 200,000 acre-foot limitation on "conservation storage" as defined by Article II(d)

of the Compact, and (4) the desilting pool should be viewed as solely or predominantly for recreational purposes and its capacity or actual storage charged against the 200,000 acre-foot "conservation storage" limitation.

New Mexico disputes all four of the plaintiffs' contentions and further asserts that the plaintiffs are barred by the doctrine of laches from seeking relief for damages alleged to have been caused by the enlargement of Ute Dam because they could and should have filed suit at an earlier date.

The four referenced issues are discussed below seriatim and recommended for disposition based on the preponderance of the evidence[7] as follows:

(1) Article IV(b) imposes a limitation on stored water, not physical reservoir capacity. This recommendation renders New Mexico's laches argument moot.

(2) Waters originating in the Canadian River Basin above Conchas Dam, but reaching the mainstream of the Canadian River below Conchas Dam as a result of spills or releases from Conchas Dam or seepage and return flow from the Tucumcari Project, are subject to the Article IV(b) limitation.

(3) The water stored in the dead storage portion of the Ute Reservoir "sediment control pool" is not chargeable against the Article IV(b) limitation. The issue of whether and to what extent the remaining water in the pool, which has been designated a "de-

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[7] Because this is not an equitable apportionment case, a "clear and convincing" burden of persuasion was not imposed on the plaintiffs. *See infra* pp. 86-88.

silting/minimum recreation pool" should be exempt from chargeability under Article IV(b) because it serves a "sediment control" purpose is referred to the Canadian River Commission for good faith negotiations and possible resolution. This referral is without prejudice to the ability of the States to later seek to invoke this Court's jurisdiction if the issue cannot be resolved within one year.

(4) The water stored in the Ute Reservoir desilting/minimum recreational pool cannot be viewed as solely for recreation, under either the Compact or New Mexico law. The same is true of the water stored in a small 400 acre-foot capacity reservoir in the State which, while it serves primarily recreation and fish and wildlife purposes, is also used for domestic stock-watering purposes. (P. Ex. 89; Agreed Material Fact F.3). Hence, the issue of whether water stored for the sole purpose of *in situ* recreational use at these two reservoirs in the Canadian River Basin in New Mexico constitutes conservation storage does not present a justiciable controversy. However, water stored in Clayton Lake and Hittson reservoirs, with a combined capacity of 4,100 acre-feet, under permits for storage solely for recreation and fish and wildlife purposes, is chargeable as conservation storage.

(5) If the foregoing recommendations are approved, New Mexico will have been in violation of Article IV(b) of the Compact since the Spring of 1987, and this matter should be returned to the Special Master for determination of any injury to Texas and Oklahoma and recommendations for appropriate relief.

V. THE DUTY OF STATES TO NEGOTIATE IN GOOD FAITH ON COMPACT CONTROVERSIES

This controversy is before this Court in large measure because the Canadian River Commission failed to deal with several compact interpretation issues in a constructive, cooperative manner, a situation with which this Court is all too familiar with respect to the Pecos River Compact. *Texas v. New Mexico*, 462 U.S. 554 (1983) and 482 U.S. 124 (1987). Because issues arising under a number of the almost two dozen other water allocation compacts appear likely to be presented to this Court for resolution in the future under similar circumstances,[8] it is appropriate that

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[8] For example, it is common knowledge that the negotiation of the Colorado River Compact of 1922 was based on water supply data which provided a reasonable basis for assuming the availability of about 17.5 million acre-feet per annum available for allocation among the Colorado River Basin States. However, water supply data over the past 65 years show that a more realistic amount is about 13.5 million acre-feet. Consequently, some have called for an original action in this Court by the Upper Basin States to void the Compact for mutual mistake of fact. *See, e.g.*, Saunders, *Reflections on Sixty Years of Water Law Practice*, Univ. of Colo. School of Law, Resource Law Notes, No. 18 (September 1989) 7,9-10. *See also* Simms, *Interstate Compacts and Equitable Apportionment*, 34 Rocky Mt. Min. L. Inst. 23-1, 23-24 through 23-27 (1988); Muys, *Interstate Water Compacts*, 375, 390-92 (1971) (National Technical Information Service, No. PB202 998). Others suggest that federal environmental control legislation of the past 25 years, particularly in the water quality field, may have superseded earlier compact consent legislation and rendered the approved allocations illusory. *See* Bloom, *The Effects of Interstate Water Quality Controls on Legal and Institutional Water Allocation Mechanisms - Can the Environmental Protection Agency Amend an Interstate Compact?*, 22 Rocky Mt. Min. L. Inst. 917 (1976); Muys, *Quality v. Quantity: The Federal Water Pollution Control Act's Quiet Revolution in*

the Court set forth in this case the nature and scope of the legal obligations of compact parties to attempt to resolve compact interpretation issues and the limitations that the Court intends to impose on the invocation of its jurisdiction to resolve such disputes in the future.[9]

The Compact Clause of the Constitution (Art. I, sec. 10, cl. 3) was designed to permit the states to continue to deal with certain interstate matters on a cooperative basis, as had been the practice in the colonies and among the states under the Articles of Confederation.[10] The requirement of Congressional consent to compacts dealing with regional matters affected with a national interest was intended to enable Congress to review the compact plan for its adequacy in protecting the federal interest in the subject matter. In essence, the framers of the Constitution were willing to allow the states to address regional problems that would otherwise be subject to the preemptive legislative power of Congress if Congress was satisfied that the national interest was adequately protected. Not only would this enable regional prob-

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Western Water Rights Administration, 23 Rocky Mt. Min. L. Inst. 1013 (1977); Hobbs & Raley, *Water Quality v. Water Quantity: A Delicate Balance*, 34 Rocky Mt. Min. L. Inst. 24-1 (1988); *Riverside Irrig. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985).

[9] *Cf. Colorado v. New Mexico*, 459 U.S. 176 (1982) and 467 U.S. 310 (1984), where the Court appeared to refine the burden of proof which a plaintiff state must satisfy in an equitable apportionment action. *Compare* Tarlock, *The Law of Equitable Apportionment Revised, Updated and Restated*, 56 U. Colo. L. Rev. 381 (1985) *with* Sherk, *Equitable Apportionment After Vermejo: The Demise of a Doctrine*, 29 Nat. Res. J. 565 (1989).

[10] Frankfurter and Landis, *The Compact Clause - A Study in Interstate Adjustments*, 34 Yale L.J. 685, 691-95 (1925).

lems to be resolved closer to home in a manner tailored to a region's peculiar circumstances,[11] but it would obviate the need for Congress to deal with such problems and forestall the states from invoking this Court's original jurisdiction in interstate disputes. The framers obviously recognized, as this Court has repeatedly advised the states which have invoked its original jurisdiction,[12] that interstate water disputes are far more amenable to solution by negotiation and agreement than by litigation.

For compacts to fulfill their intended role, it is obviously essential that the participant states enter into and implement such agreements with good faith intentions to make them work. Relatively few compacts are self executing, and the more recent ones often provide for the establishment of an interstate administrative agency, usually characterized as a "commission", to implement or enforce the compact program, as was provided for by Article IX of the Canadian River Compact at issue here. Thus, of the 21 water allocation compacts currently in effect, 11 of them provide for the establishment of a compact commission to administer the compact.[13] Since such commissions are designed to implement a compact's basic objectives, they serve a role similar to federal and state administrative agencies or executive departments in implementing legislative programs. Thus,

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[11] *Virginia v. Tennessee*, 148 U.S. 503, 517-20 (1893); Frankfurter and Landis, n. 10 *supra*. at 694-95.

[12] *Texas v. New Mexico*, 462 U.S. 554, 575-76 (1983).

[13] Simms, *Interstate Compacts and Equitable Apportionment*, 34 Rocky Mt. Min. L. Inst. 23-1, 23-3 (1988); Muys, *Interstate Water Compacts*, 12-13 (1971) (N.T.I.S., No. PB202 998).

within the general framework of a compact and its stated objectives, a compact commission clearly has the authority to interpret or clarify provisions of the compact and, to the extent not inconsistent with the basic purposes of the compact, fill in the interstices of the compact plan.[14] This is a particularly important function of compact commissions because almost all water compacts are designed to remain operative indefinitely until the participants mutually agree to alter or terminate them or Congress exercises the power it almost uniformly retains in its consent legislation to alter, amend or revoke its consent, as it did in its consent to the Canadian River Compact.[15] However, Congress rarely, if ever, has conducted oversight hearings on the status of water allocation and/or management programs under the many water compacts it has approved, let alone altered, amended or revoked its consent to any of them. Consequently, unless Congress abandons its traditional benign neglect of interstate water issues now covered by existing compacts, the resolution of known and latent problems under existing compacts presented by the passage of time, such as the recognition of reserved water rights for federally reserved lands, particularly Indian reservations, better hydrologic data, revision of predicted hydrologic patterns because of significant atmospheric changes, unanticipated agricultural, ur-

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[14] This authority is analogous to the power of a federal agency to adopt rules and policy which fill in gaps left in the Congressional delegation of authority to the agency. *See Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844-45 (1984).

[15] Section 2 of the Act of May 17, 1952, provides that "the right to alter, amend, or repeal Section 1 of this Act is expressly reserved." 66 Stat. 74, 78.

ban or environmental needs, development of new uses of water, shifting values of established uses, subsequent federal legislation impliedly superseding earlier consent statutes, etc., will have to be resolved by negotiation among the compact parties, presumably within the framework of the existing compact commissions, or by litigation in this Court.

A significant problem in this regard is that most of the compacts require unanimous agreement by the members of the compact commission on any issue of compact interpretation or implementation, as does the Canadian River Compact. This enables a single state, for whatever reason, to frustrate commission action. In water allocation compacts, it gives particular leverage to an upstream state alleged to be in violation of a compact to "stonewall" negotiations in the commission forum, since by virtue of its geographical advantage it may have already stored or used the volumes which may be in dispute. This necessarily drives its compact partners to seek to invoke this Court's jurisdiction for relief, an expensive and time consuming burden on the parties as well as on this Court's calendar. This clearly is not the result Congress intends when it grants its consent to a compact.

Consequently, it seems timely for this Court to declare that when states enter into a compact they undertake an implied commitment to make the compact work and to take no affirmative or dilatory action that would frustrate its purpose. This is the rule under general commercial contract law[16] and would seem

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[16] *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984); Restatement (Second) of Contracts §205 (1979); 4 *Corbin on Contracts* § 947 (1951 and Supp. 1971).

particularly applicable to political agreements among sovereign states.

More significantly, once the states reach agreement and seek the requisite Congressional consent to the regional program, it seems clear that any resulting Congressional consent also imposes an implied duty on the part of the compacting states to participate in good faith in the implementation of the compact plan to carry out its purposes. Such an implication is eminently reasonable, otherwise the compact program to which Congress has consented and thereby deferred direct legislative action might fail, all to the detriment of the national interest. Less obvious implied Congressional actions have been declared by this Court. *Arizona v. California*, 373 U.S. 546 (1963); *United States v. New Mexico*, 438 U.S. 696 (1978) (impliedly reserved federal water rights).

The implied commitment includes the duty to negotiate in good faith with the other states, either in the compact commission forum or otherwise, to address such matters as ambiguities or uncertainties in compact meanings, significant factual or legal assumptions underlying the compact which the passage of time has proven to be erroneous, technological and social developments that affect the original compact purposes, matters which are relevant to the compact purposes but which are not expressly addressed in the compact, technical issues subject to reasonable differences of view, and the like.[17] Such good faith

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[17] Although state representatives on compact commissions might often lack recognized expertise in water resources development matters, they are usually well supported by able legal and technical staff, as on the Canadian River Commission.

negotiations should be a condition to invoking the Court's jurisdiction to resolve any irreconcilable disputes and would serve a function analogous to the doctrine of primary jurisdiction.[18] Such a requirement is a reasonable exercise of this Court's often exercised power to limit the use of its original jurisdiction.[19] In any event, such negotiations should be required as a condition to the Court's exercise of its original jurisdiction even if there were not an implied duty to do so stemming from Congressional consent legislation. If such negotiations should demonstrate to the parties the need to renegotiate the Compact, that result would be an added benefit to all concerned.

The foregoing duty could be enforced by requiring the attorney general of any state seeking to invoke the Court's jurisdiction over a compact dispute or answering such a complaint to certify that the state

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[18] 4 Davis *Admin. Law* §22:1 *et seq* (1983 ed.). This policy differs from the proposal advanced by New Mexico and rejected by the Court in *Texas v. New Mexico*, 462 U.S. 554, 566-71 (1983), which would have limited the Court's role in compact disputes to determining whether final decisions by a compact commission were arbitrary and capricious. As the Court aptly observed, this might have enabled either Texas or New Mexico, by casting a negative vote on the Pecos River Compact Commission, to prevent a decision and thereby preclude review of the compact dispute by this Court.

The procedure recommended herein simply would require a compact commission, as a condition to any member state invoking this Court's jurisdiction, to address an issue in good faith and to develop a thorough record for review, even if the unanimous agreement of the commission required by the compact cannot be achieved. This Court reserves its prerogative to resolve the dispute if the states are unable to do so.

[19] *See Texas v. New Mexico*, 462 U.S. at 570-71.

has negotiated in good faith in an attempt to resolve the dispute. Based on such certification, the Court's order accepting the complaint would provide that its decision would be based on the administrative record developed before a compact commission or other informal negotiating body, absent good cause shown to adduce additional evidence.[20] The Court should also consider whether or to what extent legal arguments that were not presented to those entities would be entertained, *i.e.*, should it apply a rule analogous to that generally applied to judicial review of federal administrative agency decisions. 4 Davis *Admin. Law* §26:7 (1983 ed.); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). If the Court should subsequently conclude after review of the administrative record that a state had not negotiated in good faith, it might utilize appropriate sanctions against that state, such as resolving any close disputed factual issues against it or assessing it a larger share or all of the costs of the litigation.

The issues presented in the present controversy should be viewed against the commitments undertaken by the States in entering into the Canadian River Compact and the record of their consideration by the Canadian River Commission. Article I of the Compact states that two of its "major purposes" are "to promote interstate comity [and] to remove causes of present and future controversy." Such a represen-

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[20] In most cases the record would undoubtedly be informally compiled, as is the case with respect to "informal adjudications" by the Secretary of the Interior and other federal land and water agencies. In situations where important disputed issues of material fact might arise, a compact agency might find it necessary to develop a more formal hearing record.

tation by the States to each other and to the Congress reinforces the propriety of the implied duty to negotiate disputed issues in good faith. Unfortunately, the record in this proceeding, in the view of the Special Master, does not show that adequate, meaningful negotiations took place before the Commission with respect to the four issues that have been the focus of this litigation. However, since the policy recommended above is for the Court's consideration for future interstate compact disputes, I have proposed final disposition of three of the four issues presented and recommended that the fourth, primarily because of its technical, fact-specific nature, be remanded to the Canadian River Commission with directions to enter into a good faith effort to develop a meaningful record on the issue and resolve the dispute, leaving open the opportunity to ask this Court to decide the issue if the remanded proceedings prove fruitless after one year.

VI. ARTICLE IV(b)'S LIMITATION ON "CONSERVATION STORAGE" IN NEW MEXICO SHOULD BE INTERPRETED TO APPLY TO WATER IN STORAGE, NOT THE PHYSICAL CAPACITY OF RESERVOIRS

Article IV(b) of the Compact provides as follows (emphasis added):

> New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that *the amount of conservation storage* in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam *shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.*

Article II(d) defines "conservation storage" as follows (emphasis added):

> The term "conservation storage" means *that portion of the capacity of reservoirs available for the storage of water* for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, *and it excludes any portion of the capacity of reservoirs* allocated solely to flood control, power production and sediment control, or any of them.

Texas and Oklahoma contend that Article IV(b)'s limitation on "conservation storage" in New Mexico below Conchas Dam restricts the aggregate size of reservoirs that may be constructed for conservation storage purposes. New Mexico asserts that the limitation applies only to the water actually stored in its

reservoirs. Thus, although the physical capacity of Ute Reservoir and other smaller reservoirs in the Canadian River drainage basin below Conchas Dam is now about 245,000 acre-feet, New Mexico contends that it is not in violation of the Compact unless the amount of water actually stored for conservation storage purposes in those reservoirs exceeds 200,000 acre-feet. This report recommends that the New Mexico interpretation be sustained.

Texas and Oklahoma assert that the literal reading of the Article IV(b) limitation in conjunction with the definition of conservation storage in Article II(d) makes it clear that the Article IV(b) limitation is a restriction on the size of physical facilities "available" for impounding waters for conservation storage purposes. However, although the literal language of those two articles would support that claim, other provisions of the Compact, as well as the history of the Compact negotiations, compel the conclusion that the Article IV(b) restriction was intended to apply to stored water, not reservoir capacity.

New Mexico also argues that the Texas and Oklahoma claim should be barred by the doctrine of laches because those two States did not initiate this litigation until after Ute Dam had been enlarged, even though they had known of New Mexico's general intentions to do so for many years and its specific intention to do so since 1982. Because this report recommends rejection of plaintiffs' interpretation of Article IV(b), it is unnecessary to address the merits of New Mexico's laches argument. However, the Special Master is constrained to observe that New Mexico would bear a very heavy burden to demonstrate laches on the part of Texas and Oklahoma because they sought to

resolve their concerns with the enlargement of Ute Dam by negotiations within the Commission rather than immediately seeking to invoke the Court's original jurisdiction, negotiations in which New Mexico appears to have been a reluctant participant. (*See supra* Chapter V).

The basis for the recommended resolution of the "stored water" or "reservoir capacity" issue starts with the purposes of the Compact expressed in Article I, two of which were "to make secure and protect present developments within the States" and "to provide for the construction of additional works for the conservation of the waters of Canadian River". The means chosen was to protect all existing uses and to impose appropriate limitations on future storage and use of Canadian River System waters so that a reasonable amount of water would flow to the downstream states for their future use. (N.M. Exs. 30 (pp. 3-4); 64). This meant that storage limitations were needed on New Mexico, which is at the headwaters of the river system, for the benefit of Texas and Oklahoma, and on Texas for the benefit of Oklahoma. However, no limitation was imposed on Oklahoma because it was assumed that none of its uses could adversely affect the two upstream states. (N.M. Ex. 30, p. 4; P. Ex. 33).

The restrictions on New Mexico and Texas contained in Articles IV and V, respectively, are a study in contrasts. Article IV(b) is a short, cryptic section literally keyed to "conservation storage", which Article II(d) defines in terms of reservoir capacity. However, Article IV(c) briefly specifies the "conservation storage" limitation on the North Canadian River in New Mexico in terms of "storage of such water",

which plainly refers to "stored water", not reservoir capacity.[21]

Article V is a long, somewhat complicated statement of a formula for determining the ceiling on the amount of water that Texas may actually impound at any one time. There is no indication anywhere in the Compact that the limitations within New Mexico or on the two States were to be qualitatively different. Indeed, other provisions of the Compact make it clear that the limitations were all to be treated as limitations on stored water, not reservoir capacity. First, Article VII provides that the "Commission may permit *New Mexico to impound more water than the amount set forth in Article IV* and may permit Texas to impound more water than the amount set forth in Article V" (emphasis added), treating both articles as limitations on water actually impounded. If Article IV(b) were a reservoir capacity limitation there would never be any capacity available for New Mexico to impound surplus waters on a short term basis with Commission permission, thus making Article VII meaningless as far as New Mexico is concerned.[22]

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[21] Texas' and Oklahoma's contention that this article simply specifies what kind of water may be stored in available conservation storage capacity should be rejected. If conservation storage means capacity, the article would limit the size of the reservoirs on the North Canadian River in New Mexico to the amount of unappropriated water in New Mexico and Oklahoma, an essentially unknown quantity at worst and a moving target at best. But if conservation storage means stored water, then New Mexico can simply store all unappropriated water, whatever its amount.

[22] Texas and Oklahoma suggest that New Mexico could temporarily store any surplus waters in exempt capacity allocated

Second, Article VIII requires that "[e]ach State shall furnish to the Commission at intervals designated by the Commission accurate records of the *quantities of water stored in reservoirs* pertinent to the administration of this Compact". (Emphasis added). If New Mexico's limitation were a capacity limitation, it would only have been required to submit data on the capacities of its reservoirs, not actual stored water.

Therefore, looking solely to the face of the Compact, nothing justifies treating the New Mexico "conservation storage" limitation differently from the Texas stored water limitation, and other provisions of the Compact treat both limitations as ceilings on stored water, not reservoir capacity. There is no apparent reason why Texas and Oklahoma would have wanted to restrict New Mexico from constructing any size reservoir or reservoirs it wished, or why New Mexico would have agreed to do so, as long as it did not store and withhold from Texas and Oklahoma an amount of water greater than the limits specified in the Compact. Indeed, within accepted economic and environmental constraints, it promotes Article I's stated goal of "conservation" of the waters of the Canadian River to permit New Mexico to construct as large a reservoir as is appropriate for a site in order to capture and regulate as much of the river's flood flows as possible, which flows otherwise might be wasted and not conserved for beneficial use. Adherence to Compact limitations could be achieved by

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to flood control or power production. However, Ute Reservoir has no capacity allocated to either of those purposes and, even if it did, it might defeat the project purposes to use that capacity for purposes other than those for which it was designed.

operating criteria, as New Mexico has attempted to do. Of course, whether such criteria are in compliance with the Compact cannot be a matter solely for New Mexico's determination, which has been a principal area of disagreement in the present controversy.

But under the plaintiffs' contention, New Mexico would have been faced with only two options: (1) construct exactly 200,000 acre-feet of reservoir capacity which would be reduced annually by the accumulation of sediment and require New Mexico to periodically enlarge its existing reservoir or reservoirs, hardly an attractive or sensible course of action; or (2) construct enough capacity to accommodate 200,000 acre-feet of conservation storage plus enough additional capacity to capture estimated sediment over the life of the project. Under the latter alternative, Texas and Oklahoma might not permit New Mexico to store water in the unused capacity dedicated to sediment accumulation, even though water would necessarily flow to that area of the reservoir, except on a temporary annual basis with the consent of Texas and Oklahoma. (*See infra* pp. 97-98).

The recommended interpretation of Article IV(b) is reinforced by the negotiating history of the Compact, to which it is appropriate to look for the reasons detailed in Chapter VIIB *infra*.[23] That history provides not the slightest hint that the limitations on

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[23] In addition, the conflicts between Articles IV, VII and VIII resulting from a literal reading of Articles IV(b) and II (d) produce the kind of "absurd result" which this Court has always found to be justification for resort to the legislative history of a statute. *Public Citizen v. United States Dep't of Justice*, ___ U.S. ___, 109 S.Ct. 2558, 2566 (1989); *Id.* at 2574 (Kennedy J., dissenting).

Texas and New Mexico should be treated differently. From the earliest drafts of the Compact, the limitations on Texas and New Mexico were uniformly in terms of stored water, even though the definition of conservation storage was literally in terms of reservoir capacity. (N.M. Ex. 30, Ex. A). However, there was no conflict between the two articles because "conservation storage" was only used in the formulas for the stored water limitations on New Mexico and Texas, which were initially measured in part by the capacity of reservoirs in Texas and Oklahoma, respectively, available to store and release water for specified beneficial uses. (*Id.*).

The New Mexico and Texas limitations remained tied to stored water in Raymond Hill's memorandum of October 13, 1950 to the Legal Advisors (*id.*, Ex. B) and in the Legal Advisors' draft compact prepared in response to that memorandum. (*Id.*, Ex. C). However, the compact draft prepared on December 5, 1950 at the CRCC meeting restructured the limitation on New Mexico, without explanation, to restate the limitation in terms of "storage capacity", while the Texas limitation remained keyed to stored water. (*Id.*, Ex. F, p. 2). In the final version of the Compact, approved the next day, the Article IV limitation was revised again to delete the reference to "storage capacity", leaving the restriction tied to conservation storage.

Although the limitation on New Mexico was undergoing revision right up until the morning the Compact was finalized because of the decision to remove any restriction on New Mexico's use of water above Conchas Dam (*see infra* Chapter VII) and its final version did not retain language expressly keyed to stored water as earlier versions had, there is noth-

ing to suggest that the final "conservation storage" language was intended to accomplish the significant change that Texas and Oklahoma infer, particularly in light of the deletion of the reference to "storage capacity" from the December 5, 1950 draft. Had there been such an intent, it surely would have been highlighted in the Hill Memorandum. Rather, Hill was silent on this matter, simply noting that the Engineer Advisors had "originally proposed that the restrictions upon storage of all other waters of Canadian River should be similar in nature to the limitations suggested in the case of Texas" (N.M. Ex. 30, p. 3) and then explaining how the wording of Article IV evolved. Although he spoke in terms of physical construction of works to impound waters below Conchas Dam, he did not suggest that New Mexico's limitation would be in terms of reservoir capacity rather than actual stored water.

Likewise, one would have expected such a significant change, which would have primarily benefitted Texas, to have been discussed in the report of Texas Engineer Advisor Stevens to his superiors on the effect of the final Compact on Texas' interests (P. Ex. 36), but it wasn't. Indeed, Stevens characterized the limitations on both Texas and New Mexico in terms of "conservation storage", even though the Texas limitation in Article V plainly spoke only in terms of "stored water". (*Id.* at 3). Similarly, the final report of CRCC Chairman Berkeley Johnson on the Compact (P. Ex. 33) characterized both the New Mexico and Texas limitations on a parity, as limitations on "conservation storage *capacity*", even though the Article V limitation on Texas clearly is in terms of stored water. It seems clear that Stevens and Johnson, like

most of the other Compact negotiators,[24] were loosely using "stored water" and "storage" interchangeably with "conservation storage capacity", even though the Article II(d) definition of conservation storage speaks only in terms of capacity.

Texas and Oklahoma suggest that a capacity limitation may have been imposed on New Mexico because of its alleged ease of administration, *i.e.*, a one-time measurement of aggregate reservoir capacity allocated to conservation storage rather than measurement of actual volumes in storage at any particular time. Although ease of administration was clearly a goal of the Compact negotiators, there is nothing in the history of the negotiation of the Compact to support this thesis. Nor is there any apparent basis for assuming that it is easier to measure reservoir capacity than volumes of water between various reservoir elevations, or that initial reservoir capacity

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[24] For example, in describing the effect of the limitations in Article IV of the Compact, Raymond Hill used the phrases "storage of all other waters" and "storage of any of the waters", both of which refer to the physical act of storing water, as well as the phrase "a reasonable amount of storage to impound the flood flows", which plainly refers to storage *capacity*. N.M. Ex. 30, p. 3.

Similarly, New Mexico State Engineer John H. Bliss, in informing Senator Clinton Anderson that "total storage *capacity* . . . shall not exceed 200,000 acre-feet", explained that there were no restrictions "on the use of the *waters so stored*." P. Ex. 28 (emphasis added). Later, after reporting to New Mexico Governor Mabry that "total *storage* of *waters* . . . shall not exceed 200,000 acre-feet", he estimated that "storage *capacity* for all projects which may be feasible below Conchas were probably not equal to the 200,000 acre foot *storage limit*." P. Ex. 30, p.1 (emphasis added).

allocations to specific purposes, such as sediment control, would be static, rather than subject to modification because of changing circumstances.

Against that background, I have concluded that the Compact negotiators intended to place limits on the amount of water actually stored by Texas and New Mexico and that the lack of consistency in the wording of Articles IV and V is simply careless draftsmanship resulting from (1) the forced march which produced the Compact in record time and (2) the fact that the Compact appears to have been drafted by a committee on which, with all due respect, the Engineer Advisors, rather than the Legal Advisors, appear to have played the dominant role in formulating the language of those articles.

The Compact negotiators plainly concluded that the data on water actually stored that the Commission was directed to collect under Article VIII, including verifiable information as to the classification of the purposes served by various storage volumes,[25] was all the information necessary to enforce the Compact storage restrictions.[26] Texas and Oklahoma have not

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[25] Obviously, the provision of statistics on the total volumes of "water stored" by each State would not provide the information necessary to enforce the limitations on New Mexico and Texas, without further breakdown of the water physically "available for subsequent release" which was stored for the various chargeable beneficial uses or exempt functions specified in the definition of conservation storage in Article II(d).

[26] Although the Commission elected to begin to collect data on reservoir capacities in 1977 in addition to the stored water data *required* by Article VIII, that decision does not compel a different conclusion, especially since such data are collected for all three states, not just New Mexico. (P. Ex. 97V, p. 5).

demonstrated why that overriding, fundamental premise should be ignored even though the final language of Article IV(b) may not reflect that intent as clearly as it might.

VII. WATER WHICH SPILLS OR IS DIRECTLY RELEASED FROM CONCHAS DAM OTHER THAN FOR THE TUCUMCARI PROJECT, AS WELL AS RETURN FLOW AND SEEPAGE FROM THE TUCUMCARI PROJECT, WHICH IS IMPOUNDED BY DOWNSTREAM DAMS IN NEW MEXICO SHOULD BE SUBJECT TO THE ARTICLE IV(b) LIMITATION ON CONSERVATION STORAGE

A. The Issue

Article IV of the Compact specifies New Mexico's rights to use of the Canadian River (IV(a) and (b)) and the North Canadian River (IV(c)). Article IV(a) provides that "New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River *above* Conchas Dam" (emphasis added). Article IV(b) provides that (emphasis added):

> New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters *which originate in the drainage basin of Canadian River below Conchas Dam* shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.

Article IV(c) provides as follows:

> The right of New Mexico to provide conservation storage in the drainage basin of North Canadian River shall be limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and of Oklahoma.

On June 23, 1988 Ute Reservoir contained approximately 232,000 acre-feet of stored water (Agreed Material Fact F.12), of which some 180,900 acre-feet is alleged by New Mexico to be flood waters which spilled from Conchas Dam in 1987.[27] These recent Conchas spills have generated what has become the most significant issue in this litigation in terms of the quantity of water in dispute. As an affirmative defense to plaintiffs' claim that it has exceeded the conservation storage limitations of the Compact, New Mexico contends that any water which spills from Conchas Dam, and indeed any irrigation return flow or canal seepage from the Tucumcari Project (located downstream from Conchas Dam and served by a canal from that reservoir), which may be captured downstream at Ute Reservoir (or any other reservoir that might be constructed) is not chargeable against the 200,000 acre-foot conservation storage limitation of Article IV(b). New Mexico's argument rests on a literal reading of Article IV(a), which on its face grants New Mexico "free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam." Thus, New Mexico asserts that it may impound and use Canadian River waters "originating" above Conchas Dam without restriction anywhere it chooses, including Ute Reservoir, since the conservation storage limitation in Article IV(b) applies only to waters "*which originate* in the drainage basin

[27] N.M. Br. in Opp. to Complaint at App. B. No attempt was made to undertake the challenging review of the hydrologic data, operating assumptions and calculations necessary to verify this claimed amount, the accuracy of which only becomes relevant if New Mexico's claim that such amount is exempt from chargeability under Article IV(b) is sustained.

of Canadian River *below* Conchas Dam" (emphasis added).

Texas and Oklahoma contend that the language of Article IV(a) and (b) cannot bear its literal meaning when read in the context of the Compact purpose and negotiations. They argue that the Compact negotiators intended that possible spills from Conchas Dam would either flow down the mainstream for use in the downstream states or, if intercepted and stored by New Mexico, would be chargeable against the Article IV(b) conservation storage limitation as water "originating" in the Canadian River drainage basin below Conchas Dam.

B. The Propriety of Reviewing the Compact Negotiations to Interpret Article IV

New Mexico invokes the minority view of the parol evidence rule, asserting that, because there allegedly is no ambiguity in the language of Article IV, none of the documentary evidence from the Compact negotiations may be used to contradict its normal meaning. However, the better and majority view endorsed by Corbin and embodied in the Restatement (Second) of Contracts is that contract negotiations and other contemporaneous extrinsic evidence may be utilized to *interpret* a contract term where there is a dispute over its meaning, even though the language on its face may appear unambiguous. Corbin states the rationale for the majority view as follows (3 *Corbin on Contracts* §579 (2d ed. 1960)):

> No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation it is determined what the writing means. . . . Even if a written doc-

ument has been assented to as the complete and accurate integration of the terms of a contract, it must still be interpreted. . . .

As long as the court is aware that there may be doubt and ambiguity and uncertainty in the meaning and application of agreed language, it will welcome testimony as to antecedent agreements, communications and other factors that may help decide the issue. Such testimony does not vary or contradict the written words; it determines what cannot be varied or contradicted.

The Corbin view has been incorporated into Section 214 of the Restatement (Second) of Contracts.[28]

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[28] §214. *Evidence of Prior or Contemporaneous Agreements and Negotiations.*

Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

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(c) the meaning of the writing, whether or not integrated;

• • •

Comment:

. . . .

b. *Interpretation.* Words, written or oral, cannot apply themselves to the subject matter. The expressions and general tenor of speech used in negotiations are admissible to show the conditions existing when the writing was made, the application of words, and the meaning or meanings of the parties. Even though the words seem on their face to have only a single possible meaning, other meanings often appear when the cir-

This Court has also acknowledged the propriety of such aid in the interpretation of compacts. As Justice Frankfurter emphasized with respect to the compact at issue in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951), "[t]hough the circumstances of [a compact's] drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift." That truism applies with particular significance to the Canadian River Compact, which the record shows was *not* drafted "with great care and deliberation."[29]

Indeed, this Court long ago recognized, in the early stages of the dispute between Arizona and California over the meaning of the Colorado River Compact, the need to look to a compact's negotiating history in appropriate circumstances:

> It has often been said that, when the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the con-

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cumstances are disclosed. In cases of misunderstanding, there must be inquiry into the meaning attached to the words by each party and into what each knew or had reason to know.

[29] Although the Senate committee report on the bill which granted Congressional consent to the Compact stated that it was "the consensus of the Committee that the Compact is an outstanding example of able draftsmanship", S. Rep. No. 1192, 82d Cong., 2d Sess. 2 (1962) (N.M. Ex. 29), the Special Master agrees with the contrary assessment of Texas Engineer Advisor Robert M. Whitenton at the Commission's special meeting of September 29, 1982 (P. Ex. 98E) that "this has been a very poorly put together Compact" (*id.* at 105) and that the definition of conservation storage was a "woefully inadequate" one which the authors had "messed up .... very badly." *Id.* at 106.

> tracting parties to establish its meaning. . . . But that rule has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body.

Arizona v. California, 292 U.S. 341, 359-60 (1934).

In a subsequent stage of that controversy, the Court interpreted the "statutory compact" between the United States and California provided for in section 4(a) of the Boulder Canyon Project Act (43 U.S.C. §617c) by extensive reliance on the legislative history of that section, agreeing with the conclusion of Special Master Simon H. Rifkind that "the words of Section 4(a), despite their superficial simplicity, cannot bear their literal meaning."[20]

Finally, contrary to New Mexico's contention, this Court's decision in *Texas v. New Mexico*, 462 U.S. 554 (1983), also recognized the propriety of reviewing documentary material from the Pecos River Compact negotiations to interpret that compact. New Mexico argues that the Court's decision supports its view of the proper application of the parol evidence rule, inasmuch as the Court refused to provide for a tie-breaking mechanism in cases of stalemate on the Pecos River Commission because "no court may order relief inconsistent with [a compact's] express terms." (*Id.* at 564). But that statement was made with respect to Article V(a) of the Pecos River Compact, as

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[20] Report of Special Master Simon H. Rifkind, No. 8 Original (December 5, 1960) at 170, adopted in *Arizona v. California*, 373 U.S. 546, 564-75 (1963).

to which there was no disagreement between the parties as to its meaning, *i.e.*, that concurrence of both states was required for action by the Commission. Rather, the Special Master and Texas had urged the Court to "reform" Article V(a) under its general equitable powers. Consequently, the parol evidence rule was not implicated in any way in that aspect of the Court's decision. Significantly, however, for purposes of the present controversy, the Court did not hesitate to review the record of the compact negotiations in interpreting Article IV(f), the scope of which *was* in dispute.[31]

Of course, as this Court has repeatedly recognized, a compact is not only a contract but, by virtue of the Congressional consent legislation, a statute as well.[32] Here again, however, the Court has consistently found it appropriate to examine the legislative history of disputed statutory language on a variety of rationales, even when the language in question seemed otherwise clear on its face.[33] Moreover, even those who favor a rather rigid application of the "plain meaning rule" with few exceptions agree that if application of the normal meaning of a statute would produce "patently absurd consequences" or a result that "Congress could not *possibly* have intended", then resort to legislative history is appropriate.[34]

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[31] *Id.* at 569, n. 14. Although the Court stated that Article V(f) "is ambiguous as to the role of the Supreme Court", that statement seems questionable, inasmuch as Article V(f) plainly was directed to "any court".

[32] *Texas v. New Mexico*, 482 U.S. 124, 128 (1987).

[33] *Public Citizen v. United States Dep't of Justice*, ___ U.S. ___, 109 S.Ct. 2558, 2565-66 (1989).

[34] *Id.* at 2574-75 (Kennedy, J. dissenting) (emphasis in original).

However, it is difficult, if not impossible, to ascertain the legislative context for making such absurdity or intention determinations without at least some minimal examination of the legislative history to determine the broad Congressional purposes against which the consequences of applying the normal meaning of disputed language can be viewed.

With that background, I have concluded that it is necessary and appropriate to examine documentary evidence from the negotiating history of the Canadian River Compact, as well as other contemporaneous extrinsic evidence, to resolve the dispute among the parties over the proper interpretation of Article IV. This conclusion is reinforced by the fact that the haste with which the Compact was negotiated in three relatively short meetings over a five month period because of the felt urgency to reach agreement in order to permit the Sanford Project to go forward obviously led to much less careful draftsmanship than might otherwise have been the case.[35] This is reflected not only on the face of the Compact (*see supra* Chapter VI) but by the fact that the Compact Commission Chairman felt it necessary to have Raymond Hill, his Engineer Advisor and principal architect of the Compact, prepare a memorandum summarizing the evolution of the Compact language to aid in interpretation of the provisions of the Compact. (P. Ex. 140). This unusual step negates any idea that the Commission felt completely comfortable with the wording of the final product. Indeed, the minutes of the fourth and

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[35] Only a few weeks before the Compact was signed the Legal Advisors advised Raymond Hill that they were unable "to satisfactorily word those articles of the Compact dealing with restrictions upon storage." *See supra* pp. 11-12.

final CRCC meeting at which the Hill Memorandum was approved reveal that Bureau of Reclamation representatives at that meeting had questions about a number of its provisions and were directed by Chairman Johnson to discuss their questions with the Engineer Advisors after the meeting. (P. Ex. 96D, p. 2). Similarly, Chairman Johnson's letter to Hill requesting the memorandum contained reference to the following humorous episode shortly after the Compact was signed by the negotiators (P. Ex. 140):

> When at Tulsa recently attending an AWRBIAC meeting, John Bliss [New Mexico's Compact negotiator] had considerable discussion with representatives of the Bureau of Reclamation and the Corps of Engineers. Mr. Baird, lawyer for the Bureau, and Paul Sharkey interpreted the allotment of water to Texas one way; Corps of Engineers' representatives interpreted it another way. John Bliss thought both of them were wrong.

In short, the record of the Compact negotiations and the issues raised in this litigation vividly demonstrate that, as Benjamin Franklin observed, "haste makes waste".

In any event, even if ambiguity were a condition to examining the negotiating history, Article IV(a)'s provision that New Mexico shall have free and unrestricted use of all water originating in the drainage basin of the Canadian River above Conchas Dam is ambiguous on its face in light of the geographical and political realities of the Canadian River Basin. First, one of the major tributaries of the Canadian River is the Vermejo River, an interstate stream which rises

in Colorado and flows into New Mexico.[36] Consequently, reading Article IV(a) literally would give New Mexico free and unrestricted use of *all* waters originating in the Canadian River drainage above Conchas Dam, an interpretation that would have inappropriately prejudged Colorado's claim to an equitable share of those waters which originate in that state.[37] Similarly, a literal, but admittedly absurd, reading would also permit New Mexico to assert its "free and unrestricted" right even after such waters flowed across its borders into Texas and beyond. (Tr. of Dallas Oral Arg., pp. 37-39). At a minimum, then, a necessarily *implied* limitation on the scope of the "plain language" of Article IV(a) is that it applies only to Canadian River waters physically originating above Conchas Dam *within New Mexico.*[38]

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[36] P. Ex. 41, pp. 4-14; *Colorado v. New Mexico*, 459 U.S. 176, 178 (1982).

[37] When the Secretary of the Interior commented on the bill granting the consent of Congress for Oklahoma, Texas and New Mexico to negotiate a compact, he noted that Colorado contained a small portion of the basin within its borders and perhaps should be included. H.R. Rep. No. 542, 81st Cong. 1st Sess. 1 (1949). However, there is no indication that Colorado was ever invited to participate in the negotiations. Perhaps it should have been. *See Colorado v. New Mexico*, 467 U.S. 310 (1984).

[38] The early drafts of the Compact expressly embodied such a territorial limitation. *See infra* pp. 69-74. When the signed Compact was later before Congress for its consent, the report of the Senate Interior and Insular Affairs Committee on the consent legislation implied such a limitation in describing the scope of Article IV(a) as follows: "New Mexico is granted unrestricted use of all waters originating *in that State* above Conchas Dam. . . ." S. Rep. No. 1192, 82d Cong., 2d Sess. 2 (1952) (emphasis added).

In its comments on the Special Master's Draft Report, New Mexico argued that Colorado's interest is protected by Article IV(a) because its limitation on New Mexico's exclusive right to use of Canadian River waters originating above Conchas Dam should be interpreted to add the modifying clause "within New Mexico." Even though Article IV(a) is not so expressly limited, New Mexico argues that this omission is cured by Article II(a) of the Compact, which defines "Canadian River" as "the tributary of Arkansas River *which rises in northeastern New Mexico* and flows in an easterly direction through New Mexico, Texas and Oklahoma and includes North Canadian River *and all other tributaries of said Canadian River*" (emphasis added). But although the first italicized phrase appears to have a territorial limitation, the second underscored phrase is not so limited and literally would encompass the Vermejo River and other Canadian River tributaries, such as Chico Rico Creek, which rise in Colorado.

New Mexico also asserts that its exclusive right to *use* waters originating above Conchas Dam should not be read to extend beyond its borders into Texas because Article V provides that "Texas shall have free and unrestricted use of all waters . . . *in* Texas" (emphasis added), which New Mexico suggests gives Texas the exclusive right to *all* waters flowing into Texas from New Mexico, as well as those which originate in Texas. But if this is true, what has happened to Colorado's interest in the Vermejo River and other tributaries rising in that State, whose contributions to the Canadian River System New Mexico argues Article IV(a) was designed to protect from downstream claims?

In summary, New Mexico's *post hoc* rationalization of the literal language of Article IV(a) has no basis in the record and is inconsistent with its interpretation of Article V. The plain fact remains that the language of Article IV(a) requires resort to extrinsic evidence to ascertain its meaning.

Finally, application of the literal language of Article IV to the hydrology of the Canadian River in New Mexico would produce an impact on the water supply available to the Sanford Project in Texas which, while perhaps not "absurd", appears to run counter to the Congressional intention in conditioning funding of the Sanford Project on execution of the Compact and in subsequently approving the Compact. The information that was provided to Congress by the Bureau of Reclamation with respect to the Sanford Project in 1949 showed that its water supply would be drawn primarily from the mainstream of the Canadian River reaching Texas, augmented by tributary flows in Texas between the New Mexico boundary and Sanford Dam. (N.M. Ex. 57, p. 7). Similarly, when the Compact was submitted for Congressional approval in 1951, Congress was informed that it protected the legitimate interests of all three States, including an adequate water supply for the Sanford Project.[39] However, the interpretation of Article IV now advanced by New Mexico would permit that State (1) not only to impound all of the waters of the Canadian River

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[39] P. Exs. 28-29; S. Rep. No. 1192, 82d Cong., 2d Sess. (1952). The Secretary of the Interior's report on the consent bill unequivocally informed the Chairman of the Senate Interior and Insular Affairs Committee that the Compact "will not interfere with operation of the Canadian River project for its intended purposes. . . ." *Id.* at 4.

it could physically capture at Conchas Dam and above, but (2) impound most, if not all of the principal tributary inflow to the main Canadian River in New Mexico at Ute Dam,[40] and (3) build an additional dam or dams on the mainstream below Ute Dam near the Texas state line to impound mainstream waters which have spilled from Conchas Dam or are return flows or seepage from the Tucumcari Project, as well as other minor tributary inflows. Indeed, over the past 25 years the NMISC has filed numerous notices of its intention to apply for permits to appropriate and store all surface waters of the Canadian River below Ute Dam. (Agreed Material Fact E.5). There is absolutely no basis for concluding that Congress intended such a scenario in approving either the Sanford Project or the Compact.

C. The Evolution of Article IV in the Compact Negotiations and its Subsequent Construction by New Mexico and the Bureau of Reclamation do not Support New Mexico's Present Claim that Water in Ute Reservoir Which Originated Above Conchas Dam is not Chargeable as Conservation Storage Under Article IV(b)

Reading Article IV(a) in the context of its evolution in the Compact negotiations and its contemporaneous and subsequent construction, I have concluded that it was only intended to permit New Mexico free and

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[40] Although the Sanford Project authorization act provides that "[t]he use by the project of waters arising in Ute and Pajarito Creeks, New Mexico, shall be only such use as does not conflict with use, present or potential, of such waters for beneficial consumptive purposes in New Mexico", 64 Stat. 1124, 43 U.S.C. §600b, the subsequent Congressional approval of the Compact supersedes that earlier limitation.

unrestricted use of waters originating in the Canadian River drainage basin in New Mexico above Conchas Dam (the "upper basin") if such waters are stored, used or diverted for use *at or above Conchas Dam*, including diversions at Conchas Dam for use on the downstream Tucumcari Project. Under Article IV(a) New Mexico may enlarge Conchas Dam or, consistent with other downstream rights in New Mexico, construct or enlarge other upper basin reservoirs to capture flood waters for use by existing or new projects in the upper basin or by the Tucumcari Project. However, waters that cannot be captured by such works and spill or are directly released from Conchas Dam into the mainstream of the Canadian River below Conchas Dam (the "lower basin"), or canal seepage or return flow from irrigation on the Tucumcari Project which reaches the mainstream of the Canadian River,[41] were intended to be treated as waters "originating" in the lower basin and thus subject to the Article IV(b) conservation storage limitation.[42]

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[41] The Bureau of Reclamation presumably can take appropriate conservation measures to capture such waters before they reach the mainstream and apply them to other project uses. *See Ide v. United States*, 263 U.S. 497 (1924); *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945); *Bean v. United States*, 163 F.Supp. 838, 845 (Ct. Cl.), *cert. denied*, 358 U.S. 906 (1958).

[42] There may be scenarios in the future in which it would be in the interest of water conservation or sound economics for New Mexico to undertake a program of controlled releases, not spills, from Conchas Dam for storage in Ute Reservoir. The Compact negotiators plainly did not contemplate such a situation, but the Commission clearly could authorize such an arrangement with appropriate conditions to protect Texas' and Oklahoma's interests.

A natural question is why New Mexico should be permitted to capture all water originating above Conchas Dam in New Mexico and put it to use above Conchas and on the downstream Tucumcari Project, but not put it to use elsewhere below Conchas Dam without chargeability under Article IV(b) when the impact on Texas and New Mexico is the same in each case. The short answer is that such was the intent of the Compact framers and was apparently the result of negotiations based on the assessment of probable future development scenarios.

1. The States' Objectives in the Compact Negotiations

New Mexico's consistently stated objectives in the Compact negotiations were (1) to protect its existing uses, almost all of which were on projects upstream of Conchas Dam or on the downstream Tucumcari Project served from Conchas Reservoir, and (2) to retain the right to some reasonable level of development on tributaries to the mainstream of the Canadian River below Conchas Dam, principally Ute and Pajarito Creeks.

Texas sought to set restrictions on New Mexico's future storage of water for consumptive use that would permit a reasonable level of future development in New Mexico below Conchas Dam while permitting adequate flows into Texas for the Sanford Project.

Oklahoma sought flood protection and the opportunity for some future development of the Canadian River for municipal uses.

All States sought to make the Compact as simple as possible to facilitate ease of administration. Consequently, they decided to avoid the kind of complex

formula for restrictions on uses by upstream states contained in the Pecos River Compact which Texas and New Mexico had agreed to two years earlier. Instead, they adopted a scheme that would impose limitations on the amount of future storage of water in New Mexico and Texas for consumptive uses that would deplete the flow to the downstream States. The negotiators all viewed the final Compact as largely self-executing with limitations that could be easily verified and with relatively little need for detailed administrative implementation by the Commission. (P. Exs. 37 (p. 4), 110 (p. 2); N. Mex. Ex. 31, p. 2).

The development of the language in Article IV must be viewed in the foregoing negotiating context.

2. The Negotiators' Treatment of New Mexico's Uses in the Canadian River Drainage Basin Above Conchas Dam

The Engineer Advisors to the Compact Commissioners conducted a number of hydrologic studies of Canadian River water supply and existing and future uses in New Mexico as a basis for developing a limitation on future conservation storage in that State. (P. Exs. 36, 100, 109). Those studies showed that all of the waters in the Canadian River drainage basin in New Mexico above Conchas Dam had been appropriated and developed by works constructed or authorized for construction as of 1950, except for unprecedented spills from Conchas Reservoir in two years (1941 and 1942) of the 1930-50 period used for the studies.

The following general discussion of existing and future development scenarios by New Mexico Compact Commissioner John Bliss and New Mexico Interstate

Stream Commissioner Arch Hurley is summarized in the minutes of the first Canadian River Compact Commission meeting held on June 30, 1950 (P. Ex. 96A, p. 4 (emphasis added)):

> Commissioner Bliss explained that the waters of the upper Canadian above Conchas Reservoir were largely developed. In addition, there are several streams of an intermittent character below the Conchas Reservoir on which there are potential uses—for example, Ute and Pajarito Creeks. He further explained that there is some possibility of improving the seasonal distribution of water supplies in the upper area *without an increase in consumptive use*. Mr. Hurley added that there are 15,000 square miles of drainage area in the Canadian River Basin in New Mexico of which 7300 are above Conchas Reservoir. He stated that a report of the Corps of Engineers showed there were 200,000 acres of irrigated land in the basin within New Mexico; further, that irrigation development on Ute Creek had been under consideration for 25 years or more. Development in that area would depend upon flash floods. Projects on Pajarito Creek will be very expensive but that water may have to be developed as a supplemental source of supply for existing projects. He pointed out that these potentialities as well as the protection of all existing rights in the state must receive the serious consideration of the commission.

The Engineering Advisory Committee refined this assessment several months later during its delibera-

tions on October 10-11, 1950, which were summarized by Texas Engineer Advisor Stevens in a memo to his superiors which stated in part (P. Ex. 109, p. 1 (emphasis added)),

> (c) irrigation in New Mexico consists of approximately 75,000 acres of irrigation above Conchas and 32,000 acres below Conchas—irrigation below Conchas practically all in Tucumcari Project whose works have all been constructed for ultimate development of approximately 42,000 acres; tabulation of irrigation by tributaries will be furnished by New Mexico; paper rights of over 200,000 acres exist;
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> (g) above Conchas, the available water supply has all been put to use—any further development above Conchas would deplete the supply available for Tucumcari Project; *thus future developments would emphasize the better utilization of existing supplies*; . . .

The Engineer Advisors initially proposed a limit of 50,000 acre-feet on additional conservation storage of waters in New Mexico above Conchas, but upon further reflection decided that such a limitation would be meaningless because all of those waters were already "fully developed." The Hill Memorandum explained that decision as follows (N.M. Ex. 30, p. 3):

> The Engineer Advisors originally proposed that the restrictions upon storage of all other waters of Canadian River should be similar in nature to the limitations suggested in the case of Texas. However, it became evident

> during the discussions that Texas and Oklahoma both recognized that full development had already been made of all waters of Canadian River originating above Conchas Dam and that accordingly there would be no purpose in placing a limitation upon any increase in the amount of storage of such waters.

Texas Engineer Advisor Stevens explained the change in treatment of the upper basin as follows:[48]

> No restrictions were imposed *as to development above Conchas Dam* because operation studies based on ultimate development of the Tucumcari Project show that [there were] little or no water spills from Conchas Reservoir except during exceptionally wet years similar to 1941 and 1942.

Having thus protected all of New Mexico's existing and authorized uses served by Conchas Dam, primarily the Tucumcari Project, and other projects upstream of that dam, the Engineer Advisors turned to New Mexico's requirements in the Canadian River drainage below Conchas, *i.e.*, the lower basin. Their studies showed that there was an opportunity for additional irrigation development of about 10,000 acres on the lower reaches of Ute and Pajarito Creeks. Starting from that base, and apparently factoring in some estimates of possible future municipal, domestic

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[48] P. Ex. 36, p. 3 (emphasis added). Mr. Stevens' view that New Mexico would have unrestricted use of Canadian River waters "above Conchas Dam", not of waters which "originated" above Conchas Dam, is consistent with his earlier recommendation for Compact language to accomplish that result. N.M. Ex. 66.

and industrial uses in the lower basin, the Engineer Advisors concluded that 200,000 acre-feet of annual conservation storage would be sufficient to satisfy New Mexico's reasonably foreseeable future requirements in the lower basin. The Hill Memorandum explained the derivation of that limitation as follows (N.M. Ex. 30, p. 3):

> It was recognized that New Mexico was entitled to provide a reasonable amount of storage to impound the flood flows of Ute Creek and other minor tributaries of Canadian River entering the stream below Conchas Dam and above any contemplated storage works on Canadian River in Texas. It was agreed that a total of 200,000 acre feet would be sufficient to provide regulation of these tributaries and leave a reasonable margin for storage of any of the waters of North Canadian River which might be unappropriated at the time under the laws of New Mexico or of Oklahoma.

The hydrologic studies carried out by the Engineer Advisors assumed alternative development scenarios in attempting to evaluate the impact of (1) no restrictions on future storage at Conchas Dam and above, (2) full development of the Tucumcari Project and (3) future conservation storage of 200,000 acre-feet in the lower basin. Some of those scenarios showed the spills from Conchas Dam as becoming part of the mainstream supply flowing into Texas for use in that State. None of the studies assumed construction of a dam on the mainstream of the Canadian River below Conchas Dam, a development which Texas Engineer Advisor Stevens had regarded as

"unlikely". (P. Ex. 36, p. 3). Nevertheless, the Engineer Advisors did not implement that assumption by recommending that future conservation storage be restricted to the tributaries, and no such restriction was embodied in the Compact.

The most reasonable inference to be drawn from the elimination of any restriction on additional conservation storage in the upper basin because those waters were already "fully developed" is that their free and unrestricted use would be made *at Conchas Dam or above*. Although the negotiators all talked in terms of development at Conchas Dam and above, most of the water stored at Conchas Dam was diverted from the reservoir into the Tucumcari Canal for ultimate beneficial use by the *downstream* Tucumcari Project. Hence, it might not have protected that important project to give New Mexico unrestricted use of the Canadian River only at Conchas Dam *and above*. This realization probably explains why the language in Article IV(a) was changed to relate to waters *originating* above Conchas Dam, thus permitting such waters to be diverted from above Conchas for use below Conchas on the Tucumcari Project in order not to restrict future development of that project. (*See infra* pp. 68-74).

Since any increase in additional storage at Conchas and above was considered highly unlikely, the infrequent spills from Conchas were treated as part of the water supply available for use in the lower basin or, if not captured, for use in Texas. If such spills were captured, however, by a downstream reservoir, an event considered unlikely at the time but which has come to pass with New Mexico's construction of Ute Dam, there is nothing in the negotiating history of

Article IV to suggest that conservation storage of such waters would not be chargeable against the 200,000 acre-foot limitation of Article IV(b). The most that can be said about the Engineer Advisors' treatment of Conchas spills is that they apparently did not project that they would recur with the frequency and magnitude that they subsequently have. However, to conclude, as New Mexico urges, that they are not chargeable at all under Article IV(b) would confer a massive windfall on that State that clearly was not anticipated by the Compact negotiators. In addition, notwithstanding New Mexico's Ute Reservoir Operating Criteria, it would require detailed river routing and reservoir operation studies, as well as arbitrary storage volume classifications, to determine how much of the spills which had "originated" above Conchas was stored in Ute Reservoir (or any other mainstream reservoir) at any particular point in time, a difficult exercise that would be the antithesis of the simplicity of administration that the Compact negotiators sought and thought they had achieved. This task would be further complicated if it were necessary to determine how much of the "above Conchas" water originated in Colorado, to which New Mexico concedes it is not entitled to "free and unrestricted use" under Article IV(a).

In its comments on the Special Master's Draft Report New Mexico argued, for the first time, that the Compact negotiators intended to use Conchas Dam as an intrastate "boundary line" within New Mexico to make the allocations contained in Article IV. It suggests that they intended to follow the pattern of some other compacts existing at the time, particularly the Arkansas and Rio Grande compacts, which use

dams at particular points on those rivers as dividing lines for compact allocations. (N.M. Obj. to Draft Report, pp. 17-19). But even if that contention were so, and there is no mention of any other compacts or an intent to use them as models in the record of the Compact negotiations,[46] it does not advance New Mexico's cause, inasmuch as water originating above or below a specified dam would impliedly be required to be used in that same part of the basin. (*See* Tr. of Denver Oral Arg., pp. 206-09).

New Mexico's objectives in having its existing and authorized uses above and from Conchas Dam fully protected, particularly the Tucumcari Project, are assured by the interpretation of Article IV recommended herein. Similarly, its need for 200,000 acre-feet of conservation storage for consumptive uses in the lower basin is fully satisfied. Indeed, it has contracted to sell only slightly over one thousand acre-feet for such purposes since Ute Dam was constructed in 1963. (Deposition of W. J. Miller, pp. 41-53, Ex 1). Its only real complaint appears to be that it will be forced to share some of the Conchas Reservoir spills.[47]

3. Development of the Language of Article IV

The foregoing interpretation of the Article IV limitation in light of the broad purposes of the Compact

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[46] There were 16 existing water compacts at the time of the negotiations. *See Witmer, supra* n. 3.

[47] Although New Mexico contends that Texas received about half of the Conchas Reservoir spills that Ute Reservoir could not capture in 1987, it is clear that New Mexico believes that it is entitled to all such spills that it can impound, either at Ute or new reservoirs on the main Canadian River below Conchas Dam. Tr. of Dallas Oral Arg., pp. 107-08.

negotiators is confirmed by the following analysis of the development of the precise language of Article IV.

The initial draft of Compact principles proposed by the Engineer Advisors had separate major headings for the North Canadian and South Canadian Rivers and treated the rights of the three States as subparts thereunder. (N.M. Ex. 30, Ex. A, p. 1). With respect to the South Canadian River (later corrected to "Canadian River" (*id.*, Ex. B, p. 1)) it provided the following basic structure:

> Each state shall have free and unrestricted use of the flow of South Canadian River and its tributaries within its own boundaries, subject to the limitations upon storage set forth below.

Building on those principles, Raymond Hill's memorandum of October 13, 1950, to the Legal Advisors recommended restructuring the Compact format so as to have separate articles for each State treating their rights in both the North Canadian and Canadian Rivers. He proposed to lead off each such article with a declaration that the State was entitled to free and unrestricted use of the waters of the Canadian River drainage basin within its boundaries, with New Mexico and Texas subject to specified storage limitations. The introductory language proposed by Hill for New Mexico and Texas was as follows (*id.*, Ex. B, pp. 3-4):

> [New Mexico and Texas] shall have free and unrestricted use of all waters in the drainage basin of Canadian River in [New Mexico and

> Texas], subject to the limitations upon storage of water set forth below . . . .

The suggested limitation upon Oklahoma was framed differently (*id.* at 5-6):

> Oklahoma shall have free and unrestricted use of all waters of Canadian River which originate within its boundaries and of all other waters of Canadian River which at the time flow across its boundaries from New Mexico and from Texas.

No reason was offered by Hill for the different phraseology for Oklahoma and none is apparent.

Texas Legal Advisor Pruett's November 14, 1950 Compact draft adopted the introductory language recommended by Hill for New Mexico and Texas, but proposed no language at all for Oklahoma. (*Id.*, Ex. C, pp. 4-5). Oklahoma Legal Advisor Wilson later commented on that draft by recommending that the language proposed by Hill for Oklahoma in his October 13, 1950 memorandum should be utilized. (N.M. Ex. 35).

The draft prepared on December 5, 1950 modified the introductory language of the limitations on New Mexico and Texas in Articles IV and V by deleting the modifying phrase "in the drainage basin", as follows (N.M. Ex. 30, Ex. F., p. 2):

> [New Mexico and Texas] shall have free and unrestricted use of all waters [~~in the drainage basin~~] of Canadian River in [New Mexico and Texas]. . . .

No explanation was offered for these deletions and, again, none is apparent.[46] The Article VI declaration of Oklahoma's rights adopted the language from the Hill memorandum of October 13, 1950, as recommended by Oklahoma Legal Advisor Wilson. (*Id.* at 3). However, Article VI was subsequently amended in the final version of the Compact to conform to the language used for New Mexico and Texas.

The end result of the evolution of the "free and unrestricted use" language with respect to all three States is that it described all *surface* waters of the Canadian River within the Canadian River drainage basin in each State, whether they "originated" there or flowed into the State from upstream.

Against that background, we turn to the evolution of the disputed language of Article IV(a) respecting New Mexico's rights in the Canadian River above Conchas Dam.

The initial draft of Compact principles prepared by the Engineer Advisors and forwarded to the Legal Advisors proposed a 50,000 acre-foot limitation on additional conservation storage "in the drainage basin of South Canadian River above Conchas Reservoir". (N.M. Ex. 30, Ex. A, p. 2). Raymond Hill's memorandum of October 13, 1950 amended the treatment of New Mexico to reflect his proposed change of structure from one keyed to the "North" and "South" Canadian Rivers to one keyed to separate articles for each State, with separate treatment for the North

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[46] One possibility is that the reference to waters "in the drainage basin" might imply inclusion of non-tributary groundwater in the interstate Ogallala Aquifer, which the Compact did not expressly encompass.

Canadian River and Canadian River thereunder. Thus, in specifying a storage limitation on New Mexico's use of the Canadian River, he confined it to waters of the Canadian River "which originate outside of the drainage basin of North Canadian River". Coupled with the introductory phrase giving New Mexico free and unrestricted use of all waters in the drainage basin of the Canadian River in New Mexico, this maintained New Mexico's free and unrestricted use of the North Canadian River as proposed in the initial draft. However, he did not change the language specifying the limitation on future conservation storage "in the drainage basin of Canadian River above Conchas Reservoir" to substitute the "origination" language for the "drainage basin" language.

The revised draft prepared by the Legal Advisors contained the introductory "free and unrestricted use" language discussed *supra* but no language on storage restrictions, "due to a failure to satisfactorily word those articles of the Compact dealing with restrictions upon storage." (N.M. Ex. 30, Ex. C, p. 1).

After the Engineer Advisors decided to remove any restriction on future conservation storage "in the drainage basin of Canadian River above Conchas Reservoir", they revised the storage limitation on New Mexico in the December 5, 1950, draft as follows (*id.*, Ex. F, p. 2):

> New Mexico shall have free and unrestricted use of all waters of the Canadian River in New Mexico, subject to the following limitation upon storage capacity:
>
> (a) The amount of conservation storage in New Mexico available for impounding

> those waters of the Canadian River which originate in the drainage basin of the Canadian River below Conchas Dam shall be limited to an aggregate of 200,000 acre feet.

The foregoing evolution of the storage restrictions on New Mexico shows that the initial restriction segregated that portion of "the drainage basin of Canadian River above Conchas Reservoir" from the rest of the Canadian River basin. After the decision not to impose any restriction on that part of the basin, the revised limitation language only imposed a conservation storage limitation of waters "*which originate* in the drainage basin of the Canadian River *below* Conchas Dam." There was no explanation for retaining the italicized "origination" language from Hill's October 13, 1950 memorandum, but neither is there any explanation nor apparent reason why New Mexico's rights in the "lower basin" of the Canadian River below Conchas Dam should have been defined any differently than its rights in the "upper basin" above Conchas Dam were defined in the initial draft. However, Hill's earlier use of the "origination" language did not evidence a purpose to establish a more limited classification than "waters in a particular drainage basin". Consequently, I conclude that Hill did not intend the Article IV(b) "origination" language to differ from his earlier reference to "waters in the drainage basin of Canadian River above Conchas Dam".

The December 5 draft was revised later that day or on the morning of December 6. The limitation on New Mexico was restructured by abandoning the provision for "free and unrestricted use" of *all* Canadian River waters in New Mexico and substituting revised

language providing for "free and unrestricted" use of Canadian River waters "originating" in the upper and lower basins with a 200,000 acre-foot limitation in the lower basin and a special storage restriction applicable only to the North Canadian River. In addition to the probable desire to protect diversions at Conchas Dam for the downstream Tucumcari Project (*supra* pp. 62-66), another apparent reason for this change was that, after it was belatedly determined by the negotiators to impose some limitation on New Mexico's use of the North Canadian River, it was recognized at the last minute that the unlettered introductory partial paragraph of Article IV of the December 5 draft, when read in conjunction with the definition of Canadian River in that draft, continued to permit "free and unrestricted use" of the North Canadian River. Consequently, in order to accurately state the limitation on the North Canadian River, it became necessary to return to the separate treatment of the upper and lower basins. In doing so, the drafters simply extended the most recent language describing the lower basin below Conchas Dam, which contained the "origination" language, to the upper basin. There is no evidence that use of the "origination" language was intended to have any other substantive significance. In particular, for the reasons previously detailed, there is no support whatsoever to support an intention to permit New Mexico to capture spills from Conchas Dam or return flows or seepage from the Tucumcari Project without chargeability under the carefully developed 200,000 acre-foot limitation on future conservation storage in Article IV(b).

4. Subsequent Construction of Article IV

The interpretation recommended herein is also consistent with New Mexico's understanding of the limitation imposed by Article IV(b) at the time it ratified the Compact. The only hint to the contrary is contained in a letter of December 7, 1950 from New Mexico Compact Commissioner John Bliss to United States Senator Clinton P. Anderson (New Mexico) forwarding a copy of the final version of the Compact. In that letter Mr. Bliss stated that under the Compact "New Mexico has free and unrestricted use to all water above and below Conchas Dam, the only restriction being that the total storage capacity for conservation purposes of the waters rising below the dam (*not including spills*) shall not exceed 200,000 acre feet". (P. Ex. 28 (emphasis added)). Assuming that the italicized phrase was referring to Conchas spills, which is not wholly clear, this interpretation was not communicated to the other parties or, indeed, to the Governor or legislature of New Mexico, who were responsible for ratification of the Compact. (*See* P. Ex. 30). Mr. Bliss' letter of the same date to New Mexico Governor Mabry describing the Article IV(b) limitation did not include the parenthetical reference to spills contained in his letter to Senator Anderson. Indeed, he reported to the Governor that he had "consulted with the Bureau of Reclamation and checked the records available in this office and find that storage capacity *for all projects which may be feasible below Conchas* will probably not equal the 200,000 acre foot storage limit." (P. Ex. 30, p. 1 (emphasis added)). In his attempt to "sell" the Compact to the Governor, one would expect Mr. Bliss to have embellished his optimistic assessment of New Mexico's

opportunity for future development in the lower basin by adding something to the effect that the State also had an additional margin for development based on the capture of Conchas spills which would not be chargeable against the 200,000 acre-foot limitation. His failure to do so strongly indicates that he did not read the Compact as New Mexico now does.

Significantly, the subsequent message of the Governor of New Mexico transmitting the Compact to the New Mexico House of Representatives and recommending that it be approved described Article IV(a) as meaning "that all development *in the area above Conchas*, and, I might add, almost all present development is in this area, shall continue to operate and develop without compact restriction."[47] This interpretation is consistent with the Compact negotiators' intent to permit New Mexico to do whatever it wished with the upper basin waters it could capture *at Conchas Dam and above*. This understanding was reinforced by Mr. Bliss' letter to New Mexico Governor Mechem some 14 months later discussing the Compact while the Compact consent legislation was still pending before Congress, in which he did not even tie the 200,000 acre-foot limitation to "waters originating below Conchas Dam." Rather, he related the limitation to "construction of new storage reservoirs below Conchas Reservoir" without identification of water source.

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[47] P. Ex. 37, p. 3 (emphasis added). New Mexico interprets Governor Mechem's statement that the Compact did not place "any limitation on the right to construct replacement storage below Conchas Dam" as referring to Article IV(a). However, it is more reasonably read as referring to Article IV(b), the provision with the limitation language which Governor Mechem was attempting to minimize.

(P. Ex. 40). This is contrary to the present New Mexico position, under which it would be permitted to build dams on the lower basin tributaries for the conservation storage of 200,000 acre-feet and also build one or more dams on the mainstream below Conchas Dam to capture its spills. (*See* Agreed Material Fact E.5). Finally, a tentative plan for the development of the Canadian River basin in New Mexico prepared by the New Mexico AWR (Arkansas-White-Red) River Basins Coordination Committee in 1953 interpreted the Compact as permitting "New Mexico to entirely deplete the flow of the river *at Conchas Dam.*" (N.M. Ex. 56, p. 2-6 (emphasis added)).

Lastly, inasmuch as the consent legislation made the Compact a federal statute, the previously discussed Compact negotiations should be viewed as part of the legislative history of the Compact consent legislation. Although any clear Congressional understanding of disputed provisions to the contrary would arguably be controlling, neither the language of the federal consent legislation nor its relatively sparse legislative history[48] shed any light on this issue. To the extent that the parenthetical statement concerning spills by Mr. Bliss in his letter of December 7,

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[48] The House and Senate bills, H.R. 4628 and S. 1798, were introduced without accompanying statements. 97 Cong. Rec. 7296, 7614 (June 27, 1951 and July 5, 1951). No committee hearings were held. The Senate bill was passed on February 25, 1952 without objection or debate after it was amended to incorporate minor technical corrections suggested by the Senate Committee on Interior and Insular Affairs. 98 Cong. Rec. 1303-04; S. Rep. No. 1192, 82d Cong. 2d Sess. (1952). The House bill was amended to conform with S. 1798 shortly thereafter and was passed without discussion on May 5, 1952. H.R. Rep. No. 1725, 82d Cong., 2d Sess. (1952); 98 Cong. Rec. 4805.

1950 to Senator Anderson might be considered an interpretation of Article IV, nothing in the record indicates that this interpretation was also communicated by Mr. Bliss to the Texas and Oklahoma senators, nor is there anything in the legislative history of the consent legislation indicating that Senator Anderson so interpreted Mr. Bliss' parenthetical reference and communicated it in any way to any other senators, particularly those from Texas and Oklahoma.

Beyond the fact that there is nothing in the contemporaneous construction of Article IV by New Mexico at the time of Compact ratification and the granting of Congressional consent to support New Mexico's present claim, there is no evidence that New Mexico adopted and communicated such an interpretation to Texas or Oklahoma, particularly in the context of Canadian River Commission meetings, until after commencement of this suit. The claim to spills was first embodied in a revision of the Ute Reservoir Operating Criteria in October 1987 and incorporated as the second affirmative defense contained in New Mexico's Answer to the Complaint, filed December 4, 1987. The revised operating criteria were subsequently provided to Texas and Oklahoma in April, 1988. (Agreed Material Fact E.27).

There is no evidence that the present New Mexico interpretation was ever previously seriously considered internally in New Mexico, other than an isolated instance in a 1956 New Mexico State Engineer's office staff technical report on an investigation of possible Canadian River storage sites in the lower basin in which the author speculated as follows (P. Ex. 114, p. 1):

> The limit of 200,000 acre-feet [in Article IV(b)] evidently applies only to waters originating in the drainage basin below Conchas Dam and does not include waters originating above Conchas which pass though the reservoir. From 1945 through 1953 an average 21,000 acre-feet of water passed the gaging station below Conchas. It is assumed that sufficient storage, in addition to the 200,000 acre-feet set forth in Article IV, Section (b), could be provided to regulate water originating above Conchas Dam without violating terms of the Compact.

Although this portion of the report was included in the New Mexico State Engineer's Twenty-second Biennial Report (P. Ex. 112, p. 79), a public document required by New Mexico law, there is no evidence that this lower level staff engineer's interpretation was ever approved by the State Engineer's office or its legal counsel or relied on by New Mexico's Governor or legislature at any time during the period that the Ute Dam site was selected and the project authorized for construction. Indeed, the State Engineer's Twenty-third Biennial Report two years later stated:[49]

> At present water *originating* in the drainage area *below Conchas dam, including reservoir spills*, flows down the Canadian River into Texas and is not put to use within the State. The Canadian River Compact, negotiated in

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[49] Twenty-third Biennial Report of the State Engineer of New Mexico for the 45th and 46th Fiscal Years (July 1, 1956 to June 30, 1958) at 63 (emphasis added).

> 1950, allows New Mexico free and unrestricted use of this water, *except that conservation storage for water arising below Conchas Reservoir may not exceed 200,000 acre-feet.*

Most significantly, the 1956 staff interpretation was never directly communicated by New Mexico to its Compact partners until over 30 years later, after this litigation was initiated, so that there is no basis for assuming that Texas and Oklahoma acquiesced in that staff position.

Of similar significance is the fact that this interpretation was not reflected in the NMISC's 1957 notice of its intention to make a formal application for a permit to appropriate water for the Ute Project, which simply listed the "Canadian River" as the source of supply for the project and stated that it proposed to construct a project "in the drainage basin of the Canadian River in New Mexico below Conchas Dam which would provide 200,000 acre feet of conservation storage for irrigation, municipal, industrial uses." (P. Ex. 48). The 200,000 acre-feet of conservation storage specified was obviously intended to keep the project within the Article IV(b) limitation on such storage within the lower basin. But if the NMISC had adopted the interpretation of the 1956 staff report, which it now asserts, it undoubtedly would have made it clear in the application that it intended to provide 200,000 acre-feet of conservation storage of Canadian River waters "originating" below Conchas Dam and that it also would be storing some unspecified quantity of intermingled mainstream waters which had "originated" above Conchas.

The NMISC's subsequent application for a permit to appropriate water for the Ute Project filed in 1960 (P. Ex. 50) refined its statement of water source to be the "Canadian River and tributaries" and, significantly, also stated that the "[w]orks constructed under this Application are subject to Article IV(b) of the Canadian River Compact". Inasmuch as the proposed project was to be located on the mainstream of the Canadian River in the lower basin and would necessarily capture spills from Conchas and return flow and/or seepage from the Tucumcari Project, as well as mainstream and tributary flows originating in the lower basin, it is apparent that the NMISC had not adopted the staff engineer's 1956 interpretation, but had recognized that all waters to be captured by the project, including Conchas spills and Tucumcari return flows and seepage, were subject to the conservation storage limitation of Article IV(b). The New Mexico State Engineer's approval of the permit application in 1962 provides no basis for a contrary conclusion. (*Id.*; P. Ex. 51). It was not until after this litigation had been initiated and the New Mexico claim was first advanced that the NMISC permit for Ute Reservoir was belatedly amended in April 1989 to conform to New Mexico's present interpretation, an action which, under the circumstances, is entitled to no weight whatsoever,[50] at least not in support of New Mexico's position.

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[50] The amended permit was presented to counsel for Oklahoma and Texas by counsel for New Mexico at the meeting between the parties and the Special Master in Denver, Colorado on April 11, 1989. Tr. of April 11, 1989 Denver Conference, pp. 82-88. Although it was not introduced as evidence by any of the parties, it is Special Master's Ex. 2.

Another aid to construction of Article IV is the contemporaneous construction put on that article by the Bureau of Reclamation in planning for the construction of the Sanford Project, whose authorization triggered the negotiation of the Compact. In June of 1949 the Bureau had released a proposed plan of development for the Canadian River Project. (P. Ex. 99). After setting forth the water supply likely to be available for the project and existing water rights in Texas, the report concluded that (*id.* at C-71):

> [a]s portions of the basin lie in the adjoining States of New Mexico and Oklahoma, consummation of a compact among the affected States, allocating the waters of the basin among them, should be a prerequisite to initiation of construction of the project, for the principal purpose of determining the amount of water available for use in Texas.

That recommendation was implemented in the Congressional authorization of the project on December 29, 1950. (*Supra* p. 8). The Bureau therefore obviously had an important interest in the allocations that would be made by the Compact. Thus, Bureau representatives actively participated in the Compact negotiations by providing important hydrologic and other data for consideration by the Engineer Advisors and the Compact Commissioners. (P. Exs. 31, 32, 96A).[51]

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[51] *See also* Minutes of Compact Commission meeting of December 4-6 1950: "The Commission requested the Chairman to send a letter to the regional office of the Bureau of Reclamation at Amarillo thanking that agency for the aid and assistance of certain of its engineers in the technical studies made by the Engineering Advisory Committee." P. Ex. 96C, p.3.

In January 1954 the Bureau released a "Definite Plan Report" on the Sanford Project. That report necessarily had to analyze the limitations on uses in New Mexico imposed by Article IV of the Compact, which had recently been ratified by all States and consented to by Congress, since it would determine the amount of water available for the project. After reciting the provisions of Article IV it assessed future development scenarios in New Mexico as follows (P. Ex. 101, p. 50 (emphasis added)):

> *Except for the contribution received from such* [Conchas Reservoir] *spills*, the water supply for the Canadian River Project therefore must be obtained from runoff originating in the portion of the Canadian River Basin between Conchas Dam and Sanford Dam site, less the streamflow depletion caused by existing water uses and less the streamflow depletion that will be caused by such projects as may be developed in the future.
>
> *The Compact, by limiting the amount of new conservation capacity to 200,000 acre-feet thus establishes a maximum limit on the amount of additional streamflow depletion that will be permitted in the New Mexico portion of the Canadian River Basin.*
>
> • • •
>
> The minimum runoff condition at Sanford Dam site would occur with full utilization of Conchas Reservoir to supply the Tucumcari Project, plus development of a new project or projects in the portion of the Canadian River Basin downstream from Conchas Dam

with a total conservation capacity of 200,000 acre-feet.

This construction obviously assumed that the Article IV(b) limitation was a ceiling on *all* future conservation storage in the lower basin below Conchas Dam, including storage of the referenced Conchas spills.

The Bureau's 1954 construction was reiterated in its final Definite Plan Report dated November 1960 (P. Ex. 102, pp. 56, 58 (emphasis added)):

> Under the terms of the Compact, New Mexico is allowed to make full use *of the waters of the Canadian River or its tributaries below Conchas Dam, as obtained from a maximum total conservation storage capacity of 200,000 acre-feet.* This has the effect of limiting the use in New Mexico, below Conchas Dam, to the yield from 200,000 acre-feet of conservation storage, in addition to the full development of the Tucumcari Project.
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> * * *
>
> Operation of the Ute Reservoir to obtain the yield from 200,000 acre-feet of conservation storage would produce the maximum depletion of flow of the Canadian River in New Mexico allowable under the Compact provisions.

It is not usually appropriate to give much weight to the construction of a compact or statute by an agency not charged with its administration, and here the Canadian River Commission, not the Bureau, is the agency charged with the Compact's administration. However, Bureau representatives participated in

the Compact negotiations in 1950 and attended all of the Commission meetings beginning in 1954. (P. Exs. 96A-C, 97B-G). Furthermore, it is reasonable to assume that the federal chairman of the Commission consulted not only with State representatives, but with Bureau officials who had participated in the Compact negotiations a few years earlier. (*See supra* p. 82). In any event it is clear that the Bureau had a special tie to the Commission because of that situation, so that its construction of the Compact should be entitled to reasonable, even if not controlling weight.[52] Moreover, it is significant that the record indicates that the Bureau's 1954 and 1960 interpretations were not objected to by New Mexico, which received copies of the Sanford Project reports for review and comment as an interested state in accordance with established Bureau practice.[53]

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[52] *See Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1150 (D.C. Cir. 1984). The fact that the Bureau may have had an interest in advancing a construction that would be conducive to providing the maximum water supply for the Sanford Project should not influence the weight to be given that construction, inasmuch as the "safe annual yield" water supply determination used to determine the economic feasibility of the Sanford Project and the repayment obligations of its beneficiaries adopted a conservative approach which did not rely on any possible Conchas spills. P. Ex. 102, pp. 62-63.

[53] In its written comments and oral argument on the Special Master's Draft Report, New Mexico relied on certain comments by New Mexico officials made in early 1950 on a 1949 Bureau planning report on the Sanford Project in an effort to demonstrate disagreement with the Bureau's 1954 and 1960 Compact interpretations. Because the Compact was not finalized until December 1950, the earlier New Mexico comments are wholly irrelevant to any Compact interpretation.

5. Burden of Proof

During oral argument on the Special Master's Draft Report held in Denver on June 19, 1990, New Mexico counsel, in discussing the Special Master's rejection of New Mexico's interpretation of Article IV, objected to that determination on the ground that since New Mexico's affirmative defense claiming free and unrestricted use of all waters "originating" above Conchas Dam is a "legal defense to plaintiffs' allegations, plaintiffs have the burden of proof which they have not carried". (Tr. of Denver Oral Arg. at 194). New Mexico also claimed that "[t]he Master also failed to require the plaintiffs to prove that documentary history shows that the literal meaning of this compact is wrong" (*id.* at 204) and that the plaintiffs should carry the burden "because we believe that it should be the state that is alleging the violation that should carry the burden, since it should be assumed that a sovereign state is acting in compliance with the law". (*Id.* at 231-32).

This Court has not explicated the burden of proof in interstate compact cases. Although it has set out a "clear and convincing" burden of proof standard in equitable apportionment cases, *Colorado v. New Mexico*, 459 U.S. 176 (1982) and 467 U.S. 310 (1984), it has never extended that standard to disputes between states over the terms of compacts. Rather, this Court has consistently approached interstate compact disputes as matters of customary contract and statutory interpretation. *See Texas v. New Mexico*, 482 U.S. 124, 128 (1987) ("... a compact when approved by Congress becomes a law of the United States, ... but 'a Compact is, after all, a contract' ", *quoting Petty v. Tennessee - Missouri Bridge Comm'n*, 359

U.S. 275, 285 (1959) (Frankfurter, J. dissenting). Although this Court has stated in *dicta* that "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation", *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 209 (1973), under general rules governing suits for breach of contract it is clear that Texas and Oklahoma bear the ultimate burden of persuading the Court that a breach of the Compact has occurred. 9 Wigmore, *Evidence* §§2485, 2489 (Chadbourn rev. 1981). The standard of proof is a "preponderance of the evidence", which is usually defined as a reasonable probability of the truth. 30 Am. Jur. 2d *Evidence* §1164 (1967). Plaintiffs have satisfied that burden.[54]

Even if New Mexico's assertion that a sovereign state should be assumed to be acting in accordance with the law is correct, such a presumption is always rebuttable and may be overcome by a preponderance of the evidence. To the extent that New Mexico is relying on its alleged good faith interpretation of Article IV, this Court's rejoinder to a similar argument

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[54] Alternatively, if New Mexico's claim that it may store water originating above Conchas Dam in reservoirs below Conchas Dam without chargeability under Article IV(b) is viewed as an affirmative defense, which is the manner in which it became at issue, it is a well established principle that when a defendant raises an affirmative defense to an allegation that it has breached a contract, such as the affirmative defense of performance of contract conditions, the defendant bears the burden of proving that defense. 29 Am. Jur. 2d *Evidence* §§129, 142 (2d ed. 1967 and Supp. 1990); 31A C.J.S. *Evidence* §§106, 108 (1964 and 1990 Supp.); *See, e.g., United States v. Poland*, 251 U.S. 221 (1920) (a claim of bona fide purchaser of a land patent is an affirmative defense which must be set out and established). New Mexico has not carried its burden of persuasion on this issue.

in *Texas v. New Mexico*, 482 U.S. at 129, is equally applicable here:

> New Mexico, however, argues that it has no obligation to deliver water that it, in good faith, believed it had no obligation to refrain from using. It is true that Texas and New Mexico have been at odds on the interpretation of the Compact and that their respective views have not been without substantial foundation. . . . But good faith differences about the scope of contractual undertakings do not relieve either party from performance.

VIII. THE WATER IN THE DEAD STORAGE PORTION OF THE UTE RESERVOIR SEDIMENT CONTROL POOL SHOULD NOT BE CHARGEABLE AS CONSERVATION STORAGE UNDER ARTICLE IV(b); WHETHER ANY OF THE WATER IN THE DESILTING POOL PORTION IS CHARGEABLE SHOULD BE REFERRED TO THE CANADIAN RIVER COMMISSION FOR FURTHER CONSIDERATION

Compact Article II(d) defines "conservation storage" in terms of water stored "for subsequent release" for specified purposes and excludes water stored for certain purposes, including "sediment control":

> The term "conservation storage" means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

A central issue in this case is whether water stored in Ute Reservoir which New Mexico has classified as a "desilting pool" is exempt from chargeability as conservation storage under Article IV(b) because it allegedly serves a "sediment control" purpose.

The lowest outlet works at Ute Reservoir are at elevation 3725, below which no water can be released from the reservoir by natural gravity flow. (Agreed Material Fact E.12). This portion of a reservoir is customarily referred to as "dead storage", inasmuch as its principal purpose is to serve as a depository for a major portion of the water-borne sediment en-

tering a reservoir. The capacity of this dead storage pool is 20,700 acre-feet, approximately 9,810 acre-feet of which was occupied by sediment in 1983. (Agreed Material Facts E.12, E.10; Tr. of Dallas Oral Arg., p. 113).

In 1962 the NMISC obligated itself by contract with the New Mexico Department of Fish and Game to maintain a minimum pool at elevation 3741.6 for recreational purposes. (P. Ex. 52). In consideration for maintenance of the minimum recreation pool the Department of Fish and Game reimburses the NMISC for all annual operation and maintenance costs of the reservoir. (*Id.* at 2).

In 1984 the Ute Reservoir Operating Criteria established by the NMISC designated the minimum recreation pool as a "sediment control pool" comprised of the "dead storage pool" and a "desilting pool" (between the top of dead storage and elevation 3741.6) with a total capacity of 49,900 acre-feet. (P. Ex. 81). Some 4,000 acre-feet of the desilting pool was occupied by sediment in 1983. (Tr. of Dallas Oral Arg. at 113). In addition, the Ute Operating Criteria, as revised in 1987, represented that there were some 14,000 acre-feet of sediment deposits in the reservoir above the top of the desilting pool.[55]

The reason advanced by New Mexico for the creation of a desilting pool above the dead storage pool in 1984 is to maintain a relatively silt-free zone above

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[55] P. Ex. 92. This number was arrived at by adding to the total amount of sediment deposited above the desilting pool during the 1963-1983 time period (12,320 acre-feet) the estimated average yearly deposition of 590 feet per year multiplied by three for the years 1984-1986.

the desilting pool from which water may ultimately be withdrawn for municipal and industrial purposes to be served by the proposed Eastern New Mexico Water Supply Project, if and when the project is constructed. This project has been on the drawing board since 1972 and was originally designed to divert 40,300 acre-feet annually from Ute Reservoir to serve the requirements of nine small towns and cities in eastern New Mexico. (P. Ex. 116). However, the water available for the project has been reduced to 18,400 acre-feet due to sediment deposition in Ute Reservoir and only two cities have entered into preliminary water supply contracts in the event the project is ever constructed, one of which recently expired. (Tr. of Dallas Oral Arg., p. 83; P. Exs. 108Z, 108AA, p. 5; N.M. Ex. 73). New Mexico maintains that a project of some sort will ultimately be built. Texas and Oklahoma express skepticism, claiming that the Bureau of Reclamation has estimated the cost for the 18,400 acre-feet of water that could be made available to the cities under present plans would be $1,280 per acre-foot. (Plaintiffs' Comments on Draft Report at 42, citing P. Ex. 142). Consequently, plaintiffs argue that the question of whether or not such a desilting pool should be exempt from any chargeability under the Compact should not even be addressed until steps are taken to develop the project, which they contend will take seven years to plan and construct. New Mexico argues that the status of the desilting pool will be a critical factor that will have to be resolved *before* the project is authorized.

New Mexico contends that the entire 49,900 acre-feet of capacity in the sediment control pool is not chargeable as conservation storage under the Com-

pact because "sediment control" is expressly excluded from Article II(d)'s definition of conservation storage.

Texas and Oklahoma concede that any water stored in the dead storage portion of the sediment control pool is exempt from chargeability as conservation storage, recognizing that the traditional purpose served by dead storage is sediment deposition and that, in any event, such volumes are not physically available for subsequent release as required by the Article II(d) definition of conservation storage since they are below the Ute Reservoir outlet works.[56] However, they disagree that the additional 29,200 acre-feet of storage capacity in the desilting pool is exempt, arguing that the Compact exclusion applies only to capacity allocated or water stored "solely" for sediment control and that since 1962 the desilting pool has served the additional and, in their view, dominant purpose of maintaining a minimum pool for recreation and fish and wildlife purposes. New Mexico counters that the current recreation use of the desilting pool is only "incidental" to its primary sediment control

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[56] Neither the Compact nor its negotiation history shed any light on the description of conservation storage as "storage of water for subsequent release". However, it apparently was premised on the assumption that water would be stored behind a conventional dam with outlet works designed to be the sole discharge facilities and in recognition that it would be unfair to charge a State for water stored in dead storage where it physically could not be put to beneficial use. Consequently, in situations where a dam either has no outlet works or water is discharged from a reservoir by means of pumps, the descriptive language is inapplicable and provides no basis for converting water stored for what would otherwise be conservation storage into exempt storage.

purpose and should not vitiate its otherwise exempt status.

As a second line of defense, New Mexico argues that even if the recreation use of the pool is viewed as its dominant purpose, maintenance of a minimum pool for recreation and fish and wildlife purposes is not a "conservation storage" purpose under the Compact definition, nor is such water stored "for subsequent release" as specified in the definition of conservation storage, inasmuch as the NMISC obligated itself under its 1962 contract with its sister agency from releasing any of the water in the minimum pool. This recreation issue is dealt with in Chapter IX.

New Mexico further supports its claim for exempt status for water stored in the desilting pool by pointing to what it contends is similar treatment of certain volumes of water stored at the Sanford Project's Lake Meredith Reservoir in Texas, which is operated by a Texas agency under operating criteria established by the Bureau of Reclamation. At Lake Meredith all reservoir capacity below elevation 2850 is dead storage. However, the Bureau has also (1) prohibited any releases that would lower the lake level below 2855 in order to protect the physical integrity of the dam's outlet works, and (2) designated the reservoir capacity between elevations 2850 and 2860 as "inactive" conservation storage.[57] The volume of water in this in-

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[57] The Bureau of Reclamation defines "inactive capacity" as "reservoir capacity exclusive of and above the dead storage capacity from which the stored water is normally not available because of operating agreements or physical restrictions". U.S. Bureau of Reclamation, *Reservoir Data Definitions*.

active conservation pool is 35,900 acre-feet. (P. Exs. 105, 77).

To this last argument Texas responds that there are three major differences in the Ute Reservoir/Lake Meredith situations. First, the restriction on releases at Lake Meredith is imposed by an independent federal entity, the Bureau of Reclamation, whereas the Ute Reservoir operating criteria are unilaterally established and enforced by New Mexico. (Tr. of Dallas Oral Arg., pp. 88-89). Why the source of the restriction on releases should affect the merits of the restriction is not explained. Second, the purpose of the Bureau's special restriction on releases, at least from elevation 2850 to elevation 2855, is allegedly to protect the physical integrity of the Lake Meredith Dam, whereas the self-imposed contract restriction on releases at Ute Reservoir that are otherwise physically achievable without threat of damage to Ute Dam is designed solely to facilitate recreational use of the reservoir. (*Id.* at 89). New Mexico claims that the desilting pool is necessary to prevent damage to pumps that may be pumping water to the planned Eastern New Mexico Water Supply Project. Third, Texas does not treat the water in Lake Meredith's inactive pool between elevations 2855 and 2860 as exempt from chargeability under Article V of the Compact. (*Id.*, P. Ex. 77). However, Texas is not currently in a dispute with Oklahoma over the Compact limits on conservation storage at Lake Meredith, so its present, non-binding concession as to classification of the 39,500 acre-feet is easily made. Because the United States did not intervene in these proceedings, the record has not had the benefit of the Bureau of Reclamation's views on the comparability

of the two inactive conservation storage pools at Ute Reservoir and Lake Meredith. Moreover, assuming the validity of the second and third reasons advanced by Texas to differentiate the two situations, it is clear from the record in this case that the Canadian River Commission has never addressed the merits of the classifications at the two reservoirs.

New Mexico's claim for exempt status for *all* water stored in the sediment control pool established by its 1987 Operating Criteria should not be accepted at this point. There is nothing in the Compact or the history of its negotiation to indicate exactly what kind of reservoir usage the Compact negotiators intended to be encompassed within the concept of "sediment control". At the time of the Compact negotiations in 1950 it was standard practice in the construction of multiple purpose water projects to determine (1) how much storage capacity was needed for active conservation storage or other purposes over the anticipated useful life of the project, (2) how much sediment was likely to accumulate in the reservoir in 50 or 100 years or during the repayment period of the project, and (3) the size of the reservoir necessary to facilitate the accumulation of the anticipated sediment deposition while maintaining the necessary capacity for conservation storage over the project's life. (N.M. Exs. 42 (p. 3), 45B (p. 9.1.1)).

The capacity planned for sediment control usually could not be identified as to specific locations within a reservoir because of the vagaries in the manner in which sediment is deposited on a reservoir floor. However, all reservoir planning provided for a dead storage pool in order to have the outlet works at a level where sediment on the bottom of the reservoir would

not interfere with water releases for various purposes. All of the available evidence indicates that the dead storage pool was recognized as the reservoir area where most of the sediment would be deposited. (N.M. Ex. 45B, p. 9.4.1). Nothing in the literature at the time or since supports New Mexico's claim that the concept of a desilting pool in addition to dead storage was a recognized practice encompassed within the concept of "sediment control" in 1950.

New Mexico's reliance on the established practice in 1950 of constructing small dams for the purpose of sediment control under various watershed protection programs is misplaced. (N.M. Ex. 63). Such dams were constructed "solely" for sediment control and served no other purpose. None of the water was stored for subsequent release for various beneficial uses, but was simply stored in order to prevent its heavy sediment load from causing damage downstream, even though it may have been used incidentally and temporarily for stock watering, recreation or fish and wildlife purposes. (*Id.* at 174-76, 195-96). Indeed, since there were numerous small watershed protection programs operating throughout New Mexico, Texas and Oklahoma under the aegis of the United States Soil Conservation Service in 1950 (*id.* at 166), it may have been such small impoundments built "solely" for sediment control that the Compact negotiators had in mind in excluding such storage from chargeability as conservation storage.[58]

It is difficult to dispute plaintiffs' contention that, even if the desilting pool could be equated with sed-

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[58] A representative of the Soil Conservation Service attended two of the meetings of the Compact negotiators. P. Exs. 96A; 96C.

iment control, it is not used "solely" for that purpose. Indeed, in a multipurpose project few areas of the reservoir are used exclusively for any particular purpose. Dead storage comes close to serving only a single function, *i.e.*, sediment control, but even dead storage water helps provide "head" for power generation and affords space for fish habitat where, as at Ute, recreational fishing is an important use of the reservoir. Consequently, the Compact negotiators' use of "solely" to limit exemptions for flood control, power generation and sediment control may unwittingly have imposed an unattainable condition with respect to such exempt classifications in a multiple purpose reservoir. At a minimum, it is clear that they did not fully consider the difficulty in applying that constraint to such projects.

In summary, all that can be said with confidence on this issue is that "dead storage" in a multiple purpose reservoir and any storage of water by a single purpose silt control project were intended to be exempt from chargeability as conservation storage under the Compact because of their dominant "sediment control" purposes.

However, even though the concept of a desilting pool was not within the ambit of sediment control practice addressed by the Compact negotiators in 1950, it may constitute the kind of evolution of reservoir operating concepts which presents an issue of Compact interpretation appropriate for consideration and disposition by the Commission in the first instance. Essentially the same issue surfaced at the third meeting of the Commission in 1955 when the Oklahoma Commissioner raised the question of whether reservoir *capacity* allocated for *future* sedi-

ment deposition constituted conservation storage until that space was occupied by sediment. (P. Ex. 97C, p. 3). Mr. John Bliss, who had been New Mexico's representative on the Compact Commission in 1950, replied that an answer to that question would require "considerable thought" and suggested that the matter be deferred. (*Id.*). The issue was raised again at the next two Commission meetings in 1956 and 1957, but was not resolved. (P. Exs. 97D, 97E). The minutes of the 1957 meeting show that Oklahoma's motion that "water stored in the sediment pool be treated as water for conservation purposes" and New Mexico's motion that "water in storage allocated for sediment control may not be released for beneficial use" were proposed and failed for lack of a second. (P. Ex. 97E, p. 2). The minutes of that meeting also show that, after further discussion of the issue, the Oklahoma Commissioner stated that the problem "was clear to all and no resolution was needed". The federal chairman agreed. (*Id.*). The basis for those opinions is not apparent.

Fortunately, the issue of how to treat reservoir *capacity* allocated to sediment control before it is occupied by sediment is only relevant if the Compact imposes a limitation on a State in terms of reservoir capacity rather than stored water. Articles V and VI plainly impose no such limitation on Texas and Oklahoma on the Canadian River and, for the reasons set forth earlier in this report, Article IV should not be construed as a capacity limitation on New Mexico. Thus the only way in which the issue could become relevant would be in connection with determining Article V's stored water limitation on Texas on the North Canadian River, which is measured in terms

of water actually stored or that "*could be stored*" in Oklahoma, since the emphasized phrase would appear to relate only to physical *capacity*. That issue is not before the Court.

The record on this issue suggests that one of its most disturbing aspects to Texas and Oklahoma is the perceived high-handed way in which New Mexico unilaterally established the sediment control pool in 1984 and asserted an exemption for it. Consistent with the goals of the Compact, New Mexico should have taken that action in consultation or negotiation with its Compact partners, inasmuch as the effect was to provide the basis for a claim to the right to withhold almost 30,000 acre-feet of water on a permanent basis from the downstream States based on a concept which, however much technical merit New Mexico may believe it has, must be viewed as unprecedented. This is the very kind of issue upon which, for the reasons detailed in Chapter V, the Compact imposed a duty on New Mexico, as well as Texas and Oklahoma, to negotiate in good faith. That did not happen.[59]

Texas and Oklahoma urge that the issue should be resolved at this time because the present record is adequate to do so and further consideration by the Commission is unlikely to produce agreement among the States. New Mexico appears more sanguine. (Tr. of Denver Oral Arg., p. 210). Although the sparse record developed by the parties probably provides an

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[59] Paragraphs (4) and (5) of the recommended decree, *infra* p. 113, require Commission approval of future designations of storage volumes for exempt purposes in order to make it clear that such unilateral actions cannot escape Commission review. *See infra* n. 67.

adequate basis for a decision, I recommend that this issue be referred to the Canadian River Commission and that the States be directed to enter into good faith negotiations to develop a record before the Commission with respect to (1) the propriety of the Ute Reservoir desilting pool classification, (2) the appropriate amount of such storage, if any, that should be exempt from Compact chargeability if it is not "solely" for desilting purposes, (3) whether such a designation, although appropriate, may be premature in light of the fact that the municipal and industrial purposes for which the desilting pool is allegedly needed are not in immediate prospect,[60] (4) the comparability of the Ute Reservoir desilting pool to Lake Meredith's inactive conservation pool, and (5) other relevant factors. The federal chairman of the Commission should obtain the views of the Bureau of Reclamation and Corps of Engineers on those same considerations. If these further proceedings do not produce agreement on the issue within one year from the date of the Court's decree in this case, any of the States may apply to the Court under the recommended decree for its resolution.

The question remains as to how to charge the approximately 25,000 acre-feet of water currently in the desilting pool[61] pending the ultimate settlement or ju-

[60] For example, the Commission might concede the propriety of exempt status for a desilting pool of some magnitude, but not until the Eastern New Mexico Water Supply Project or similar project, for which the desilting pool is allegedly designed, is close to being a reality.

[61] Some 4,000 acre-feet of the 29,200 acre-feet of capacity of the desilting pool was occupied by sediment in 1983 (Agreed Material Facts E.10, E.19) and some additional deposition has undoubtedly occurred since then. *See supra* p. 90.

dicial resolution of this issue. I recommend that the chargeability issue not be addressed until the further proceedings on this issue are completed. If the matter is resolved by the Commission, presumably it will encompass all issues related to storage in the desilting pool. If the Court is required to decide the issue and resolves it against New Mexico, issues of appropriate relief can be addressed at that time. New Mexico might be ordered to release some or all of the water in the desilting pool and/or to compensate Texas and Oklahoma monetarily for any injury resulting from New Mexico's withholding of such water in violation of the Compact.

Texas and Oklahoma would rather have the water now than money later for the several years delay in receiving it should they ultimately prevail on the issue. But if those states prevail they may receive both water and damages. On the other hand, if New Mexico were ordered to release the water now and later establishes the exempt status of the desilting pool before the Commission or the Court, it would not be able to recoup the released water easily. Under the recommended procedure, New Mexico retains the disputed water in storage until the issue is resolved, subject to the risk of possibly having to release it and pay damages for past unlawful retention if its contentions are rejected.

IX. NEW MEXICO'S CLAIM THAT WATER STORED SOLELY FOR *IN SITU* RECREATIONAL USE IS NOT CHARGEABLE AS CONSERVATION STORAGE SHOULD BE REJECTED.

New Mexico contends that even if the Ute Reservoir desilting pool is viewed as a recreation pool, as Oklahoma and Texas claim it should be, it is not chargeable as conservation storage because recreational use is not expressly encompassed within Article II(d)'s definition of conservation storage.

Texas and Oklahoma contend that the specified beneficial uses in the conservation storage definition were not intended to be exclusive, but only illustrative of "consumptive" uses that would deplete the stream flow with a resulting adverse effect on downstream states. Since the permanent retention of water in Ute Reservoir for recreational purposes has such an adverse effect, they argue that it should be treated as conservation storage.

The parties do not dispute that the record of the Compact negotiations shows that the question of the treatment of water stored either solely or incidentally for recreation purposes was not addressed by the Compact negotiators. This is undoubtedly because in 1950 recreation was considered primarily as an incidental use of water stored for traditional beneficial uses for irrigation, industrial, domestic and municipal purposes, even though it had been held to be a beneficial use under New Mexico law in 1945.[62] Indeed, it was not established as an authorized project pur-

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[62] *State ex rel. State Game Comm'n v. Red River Valley Co.*, 51 N.M. 207, 218, 182 P.2d 421, 428 (1945); *cf. Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1136 (10th Cir. 1981).

pose for federal water resource development projects until the Federal Water Project Recreation Act of 1965 (16 U.S.C. §460 *et seq.*). The most reasonable inference to be drawn from Article II(d) defining conservation storage with reference to certain traditional consumptive uses and exempting flood control, power production and sediment control is that the negotiators only wanted to restrict a State's storage of water that was destined for consumptive uses that could deplete the flow available to downstream States. Thus it was apparently assumed that temporary storage of water for flood control or power production would not prejudice downstream users because those volumes would be released and become available to the downstream States.[63] Water maintained in storage solely for *in situ* recreational use at a reservoir, however, would appear to have an equally, if not greater, adverse impact on downstream States than water released for the specified conservation storage purposes, which at least results in some return flow for use downstream. On the other hand, water stored and later released for downstream recreational or fish and

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[63] Whether a rule of reason should be applied to limit storage for the exempt purposes is not presented in the present controversy, although it is not difficult to imagine hypothetical situations where it should be. For example, a single purpose hydropower project might be constructed that would require an inordinate amount of storage to provide "head" for rather limited power production. The result would be that only the relatively modest amounts of water released through the dam's turbines would ever have a chance of reaching a downstream state, while the bulk of the water below the turbine outlet works would remain in storage. Similarly, outlet works in a multiple purpose dam might be placed at such an elevation as to create an inordinately large "dead storage" pool for sediment collection.

wildlife purposes, such as rafting or maintenance of minimum stream flows for fish and wildlife habitat, is more akin to releases for flood control and power production purposes, since much of such releases reaches the downstream States.

New Mexico contends that this recreation issue has already been resolved by the Commission's 1976 decision not to include reservoirs used solely for recreation purposes in an inventory of reservoirs in the three states subject to the Compact. (N.M. Ex. 44; P. Exs. 98B (pp. 21-23, 98E (pp. 21-36)). However, the Commission action relied on by New Mexico did not purport to deal definitively with the issue, but only excluded such reservoirs from the inventory *at that time.* Subsequent inventories from 1978-86 included recreation reservoirs. (P. Exs. 95Q-95U). Given the oblique manner in which the issue surfaced, the inconclusive nature of the reasons for excluding such reservoirs from the initial 1976 inventory, the absence of any demonstrated intent on the part of the Commission to have the inventory carry any legal effect,[64] and the clear absence of any careful consideration of the issue in a meaningful context such as the enlargement of Ute Dam in 1984 has since presented,

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[64] When the Commission later took up the 1977 reservoir inventory report, Oklahoma Commissioner King objected to it because it included reservoirs in watersheds in Oklahoma which Oklahoma did not consider subject to the Compact. Texas Commissioner Duggan moved to note in the report that "[t]he following inventory is for informational purposes and is not intended for the determination of the obligation of the states under Articles IV and V of the Compact." The Texas and New Mexico Commissioners voted in favor of the motion, but it did not satisfy Oklahoma Commissioner King, who voted against it. P. Ex. 97X, p. 5.

it is clear that the Commission has not yet dealt definitively with the issue.

With respect to Ute Reservoir, which has been the focus of this controversy, the application to appropriate the waters of the Canadian River in the lower Canadian River basin by the NMISC in 1960 was stated to be for storage at Ute Reservoir and ultimate beneficial use for "irrigation, municipal, industrial, recreational, fish and wildlife, domestic, and power generation, sediment and flood control." (P. Ex. 50). The permit approved in 1962 was for those same purposes. (P. Ex. 51). The NMISC obviously made its appropriation as broad as possible to give it maximum flexibility to utilize the stored waters as evolving circumstances required. Since the NMISC appropriation is, *inter alia*, for a number of beneficial purposes undeniably encompassed within the Compact definition of conservation storage, such stored waters should *all* be treated as conservation storage since they are not stored solely for expressly exempt purposes, *i.e.*, flood control, power production, or sediment control. The legal status of such waters as conservation storage should not be altered by the fact that they may be used at particular points in time for incidental purposes, such as recreation and fish and wildlife, or are commingled with waters physically available for release for purposes not expressly designated as conservation storage.[65] All such waters remain ***physically*** available for release for the conservation storage purposes specified in the ap-

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[65] *See California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) (commingled intrastate and interstate gas transported by the same pipeline are both considered to be in interstate commerce); *FPC v. Amerada Petroleum Corp.*, 379 U.S. 687 (1965).

proved permit.[66] Whatever NMISC and its sister state agencies, such as the Fish and Game Department, may choose to do as a matter of *intra*state policy with respect to timing and use of the stored waters for various purposes, all waters stored for non-exempt purposes should be treated as conservation storage as a matter of New Mexico's interstate obligations under the Compact.[67]

The Draft Report concluded that it is unnecessary to decide the Ute Reservoir recreation issue at this time because no justiciable controversy is presented. It reasoned that it is for New Mexico to determine whether it wants to make Ute Reservoir a single purpose recreation facility or whether it wishes to use some or all of the conservation storage in the reservoir to meet the requirements of the cities who would be the beneficiaries of the proposed Eastern New Mexico Water Supply Project. If New Mexico should choose the former alternative and modify the NMISC's permit for the project accordingly sometime in the future, the Commission and, if necessary, this

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[66] Texas and New Mexico express concern that New Mexico might construct a reservoir solely for recreational purposes just above the Texas-New Mexico boundary with *no* outlet works and contend that the stored water is not chargeable as conservation storage because it is not stored "for subsequent release" as provided in Article II(d). However, the "release" language was not intended to create such a loophole. *See supra* n. 56.

[67] This Court has made it clear that "it requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting states." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

Court could address whether and to what extent stored water devoted solely or predominantly to *in situ* recreation should be chargeable as conservation storage under the Compact. Needless to say, constructive negotiations among the States would be far more likely to produce mutually equitable benefits consistent with the Compact's goals than any decision by this Court.

However, in their written comments and oral arguments on the Draft Report the States pointed out that even if the issue may not present a justiciable controversy with respect to Ute Reservoir, it is directly presented by the situation at Clayton Lake and Hittson reservoirs in New Mexico, which impound some 3,967 and 135 acre-feet, respectively, behind small dams pursuant to permits which only authorize the use of the stored water for recreational and fish and wildlife purposes.[68]

Although the quantity of water involved at those reservoirs is relatively small, so that resolution of the issue will not be determinative of whether New Mexico is or is not in violation of the Compact, a judicial determination at this time may affect the magnitude of what this Report finds to be New Mexico's existing violation and may apply to other similar situations in the future, including possibly Ute Reservoir, thus enabling all parties to better plan for the future.

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[68] N. Mex. Exs. 72d, 72i. One other small reservoir stores water only for recreation, fish and wildlife, and domestic stock watering purposes. But, as at Ute Reservoir, because the stored water is to be used in part for a domestic purpose chargeable as conservation storage, all of the stored water should be chargeable.

Countervailing considerations include whether to present the Court with the difficult question of how to deal with an important matter which the Compact has failed to address expressly and the Commission has not yet resolved. For example, although the Commission undoubtedly has the authority to fill in such interstices in the Compact scheme, the voting provisions of the Compact will preclude such action in the absence of unanimity among the Compact partners. In such event, would Texas and Oklahoma have the right, as they contend they do, to rescind the Compact for mutual mistake of fact or law as to its scope, or to bring an equitable apportionment action for an allocation of the use of the Canadian River System solely for the recreational purposes not expressly covered by the compact?

Balancing the foregoing considerations, and because the recreation issue at Clayton Lake and Hittson reservoirs is purely legal, unlike the desilting pool issue, the following conclusions on the merits are recommended.

First, as to the scope of compacts generally, in the absence of express language in a compact excluding certain beneficial water uses from allocations or restrictions made by the compact or persuasive evidence in the record of the compact negotiations evidencing an intent to do so, such allocations should be viewed as encompassing all purposes for which water may be stored or used. Second, applying those two criteria to the Clayton Lake and Hittson reservoirs, water stored there solely for *in situ* recreational use should be chargeable as conservation storage under the Compact. The specified conservation storage purposes in Article II(d) are most reasonably read as illustrative

of traditional "consumptive" uses which would deplete the flow to downstream States, and not as an exclusive list of beneficial uses to be chargeable as conservation storage. Inasmuch as water stored for *in situ* recreation use has a similar impact on the downstream States, it should be chargeable as conservation storage. Likewise, there is no discernible rationale for treating *in situ* recreation as an exempt use, as there is for each of the storage purposes expressly excluded from the definition of conservation storage. The history of the Compact negotiations provides no basis for a contrary conclusion.

For the reason detailed earlier (*supra* note 56), water stored at Hittson Reservoir is not exempt from chargeability as conservation storage even though there are no outlet works making it available for subsequent release.

X. IMPACT OF REPORT RECOMMENDATIONS

There were 232,000 acre-feet of water stored in Ute Reservoir on June 23, 1988, excluding sediment. (Agreed Material Fact F.12). In addition, there are eleven other reservoirs within the drainage basin of the Canadian River below Conchas Dam in New Mexico with capacities greater than 100 acre-feet. Eight of these reservoirs with a total capacity of 2,260 acre-feet, including undetermined sediment accumulation, make water available for releases for irrigation use. Three of the eleven reservoirs are maintained to their maximum controlled capacity totalling approximately 4,500 acre-feet, including undetermined sediment accumulation, for recreation, fish and wildlife and domestic stock watering purposes. (Agreed Material Fact F.3).

The States' contentions as to the chargeability of such uses as conservation storage under Article IV(b) of the Compact and the impact of the proposed recommendations in this Report are shown on the table below. If the recommendations are adopted by the Court, the result will be that New Mexico has been in violation of the Article IV(b) limitation since the Spring of 1987. The magnitude of the violation may be increased depending on how the volume of water stored in the desilting pool portion of the Ute Reservoir sediment control pool is classified by the Commission or the Court as a result of the further proceedings on this issue recommended herein.

ARTICLE IV(b) CLASSIFICATIONS OF STORED WATER IN NEW MEXICO JUNE 23, 1988 (TO NEAREST 100 A/F)

	New Mexico	Texas & Oklahoma	Special Master
UTE RESERVOIR			
A. Exempt Storage			
1) Orig. Above Conchas	180,900	None	None
2) Dead Storage	10,900	10,900	10,900
3) Desilting Pool	25,100	None	Remand
B. Conservation Storage	15,100	221,100	196,000
SMALL RESERVOIRS			
A. Exempt Storage	4,500	None	None
B. Conservation Storage	1,900[1]	5,800[2]	5,800[2]
TOTAL CONSERVATION STORAGE	17,000	226,900	201,800

[1] 2,260 acre-feet of capacity less estimated sediment accumulation equal to 15% of capacity, which is ratio of silt to total capacity at Ute Reservoir.

[2] 6,760 acre-feet of capacity less estimated sediment accumulation equal to 15% of capacity, which is ratio of silt to total capacity at Ute Reservoir.

XI. RECOMMENDED DECREE

In their comments on the Special Master's Draft Report Texas and Oklahoma requested that the recommended decree be cast in an injunctive form. However, the recommended decree is designed only to state the applicable legal principles derived from the Canadian River Compact which govern the resolution of the present dispute. If the recommendations in this Report are adopted, the subsequent proceedings on appropriate relief will provide the basis for any injunctive relief that may be required.

DECREE

(1) Under Article IV(a) of the Canadian River Compact ("Compact") New Mexico is permitted free and unrestricted use of the water of the Canadian River and its tributaries in New Mexico above Conchas Dam, such use to be made above or at Conchas Dam, including diversions for use on the Tucumcari Project.

(2) Under Article IV(b) of the Compact New Mexico is limited to storage of 200,000 acre-feet of Canadian River water, regardless of point of origin within New Mexico, in reservoirs in the Canadian River Basin in New Mexico below Conchas Dam for any beneficial use, exclusive of the exempt purposes specified in Article II(d) of the Compact.

(3) Quantities of water stored for flood protection, power generation or sediment control are not chargeable as conservation storage under the Compact even though incidental use is made of such waters for recreation, fish and wildlife or other purposes not expressly mentioned in the Compact. In situations where storage may be predominantly, though not exclu-

sively, for an exempt purpose, nothing in the Compact precludes the Canadian River Commission ("Commission") from exempting all or an appropriate portion of such storage from chargeability as conservation storage.

(4) Water stored at elevations below a dam's lowest permanent outlet works are not chargeable as conservation storage under the Compact unless other means of water discharge are utilized in the dam's operation, such as pumps, without Commission approval. No change in the location of a dam's lowest permanent outlet works to a higher elevation shall provide the basis for a claim of exempt status for all water stored below the relocated outlet works without approval of the Commission. Water stored for non-exempt purposes behind a dam with no outlet works is chargeable as conservation storage.

(5) Future designation or redesignation of storage volumes for flood control, power production or sediment control purposes must receive Commission approval, which approval shall not be unreasonably withheld.

(6) All water currently stored in Ute Reservoir is conservation storage, except water in dead storage below elevation 3725 and such portion of the water stored between elevations 3725 and 3741.6 as the Commission or this Court may determine, pursuant to paragraph (10) of this decree, is reasonably stored for sediment control.

(7) There are eleven reservoirs other than Ute Reservoir within the drainage basin of the Canadian River below Conchas Dam in New Mexico with capacities greater than 100 acre-feet with a total capacity of

6,760 acre-feet, including undetermined sediment accumulation. All water stored in these reservoirs is conservation storage.

(8) There are 63 small reservoirs in New Mexico with capacities less than 100 acre-feet with a total capacity of about 1,000 acre-feet, which the Commission has treated as *de minimis*. Water stored in these reservoirs is not chargeable as conservation storage.

(9) New Mexico has been in violation of the limitation on conservation storage under Article IV(b) of the Compact since the Spring of 1987. This matter is referred to the Special Master to determine any injury Texas and Oklahoma may have sustained as a result of such violation and to recommend appropriate relief.

(10) The States are directed to enter into appropriate proceedings before the Commission to determine whether and to what extent water may be stored in the desilting pool portion of the Ute Reservoir sediment control pool without chargeability as conservation storage. In making such determination the chairman of the Commission shall enlist the assistance of the Bureau of Reclamation, the Corps of Engineers, and other appropriate federal or state agencies. The Commission shall compile a record of the documents, written legal arguments and any transcripts of testimony or argument on which its deliberations and decision, if any, are based. If unanimous Commission action cannot be achieved within one year of this decree, any State may petition this Court to resolve the dispute. Consideration of the dispute by this Court shall be limited to the administrative record developed before the Commission.

(11) The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of this decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Respectfully submitted,

Jerome C. Muys
Special Master